1993

State Bank of Southern Utah, a Utah Banking Corporation v. Troy Hygro Systems, Inc., Michael R. Kehl, Gloria F. Kehl, Donald K. Kehl, Lenore F. Kehl, Keith Kehl, Karen Sue Kehl, and John Does 1 through 10 : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE BANK OF SOUTHERN UTAH,
a Utah Banking Corporation,

Plaintiff and Appellee,

vs.

TROY HYGRO SYSTEMS, INC.,
MICHAEL R. KEHL, GLORIA F. KEHL,
DONALD K. KEHL, LENORE F. KEHL, CASE NO. 930358-CA
KEITH KEHL, KAREN SUE KEHL and
JOHN DOES 1 through 10,

Defendants and Appellants. Priority No. 15

TROY HYGRO SYSTEMS, INC.,
MICHAEL R. KEHL, GLORIA F. KEHL,
LENORE F. KEHL, KEITH KEHL and
KAREN SUE KEHL,

Counterclaimants and Appellants,

vs.

STATE BANK OF SOUTHERN UTAH,
a Utah Banking Corporation,

Counterclaim Defendant and Appellee.

BRIEF OF APPELLEE

An appeal from the decision rendered by Judge Robert F. Owens, Fifth District Court, Iron County, State of Utah.

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DETERMINATIVE STATUTE:

Utah Code Annotated § 17-12-44 (1992) states:

> In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

JURISDICTIONAL STATEMENT

Respondent concurs with Appellants' jurisdictional statement.

STATEMENT OF ISSUES

1. Did the trial court correctly rule that certain of the claims in the Defendants' Counterclaim were barred by the statute of limitations? In reviewing a grant of summary judgment, the standard of review is that the appellate court accord no deference to the trial court's ruling and review it for correctness. *Buchanan v. Hansen*, 820 P.2d 908, 908 (Utah 1991). The appellate court is to apply the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

2. Did the trial court correctly rule that the Defendants had failed to state a claim, as a matter of law, as to certain other claims in their Counterclaim? In reviewing a grant of summary judgment, the standard of review is that the appellate court accord no deference to the trial court's ruling and review it for correctness. *Buchanan v. Hansen*, 820 P.2d 908, 908 (Utah 1991). The appellate court is to apply the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

3. In the event this Court should find that the trial court erred in its ruling that certain of the Defendants' claims were barred by the statute of limitations, should the dismissal still be upheld because the Defendants have failed to make their case as a matter of law? In reviewing a grant of summary judgment, the

standard of review is that the appellate court accord no deference to the trial court's ruling and review it for correctness. *Buchanan v. Hansen*, 820 P.2d 908, 908 (Utah 1991). The appellate court is to apply the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

4. Did the trial court correctly rule that certain of the claims in the Defendants' affirmative defenses were barred by the statute of limitations? In reviewing a grant of summary judgment, the standard of review is that the appellate court accord no deference to the trial court's ruling and review it for correctness. *Buchanan v. Hansen*, 820 P.2d 908, 908 (Utah 1991). The appellate court is to apply the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

5. Did the trial court correctly rule that the Defendants had failed to state a claim, as a matter of law, as to certain other claims in their affirmative defenses? In reviewing a grant of summary judgment, the standard of review is that the appellate court accord no deference to the trial court's ruling and review it for correctness. *Buchanan v. Hansen*, 820 P.2d 908, 908 (Utah 1991). The appellate court is to apply the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

6. In the event this Court should find that the trial court erred in its ruling that certain of the Defendants' affirmative

defenses were barred by the statute of limitations, should the dismissal still be upheld because the Defendants have failed to make their case as a matter of law? In reviewing a grant of summary judgment, the standard of review is that the appellate court accord no deference to the trial court's ruling and review it for correctness. *Buchanan v. Hansen*, 820 P.2d 908, 908 (Utah 1991). The appellate court is to apply the same standard as that applied by the trial court. *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

STATEMENT OF THE CASE

Nature of Case and Course of Proceeding

This case involves a series of claims between State Bank of Southern Utah, a Utah banking corporation ("State Bank"), and Troy Hygro Systems, Inc. ("Troy Hygro"), and its principals, who are State Bank's borrowers. Troy Hygro and its principals, who were the Defendants at the trial court, will be referred to herein collectively as "Borrowers" or "Defendants." State Bank provided funding for Troy Hygro's business operation consisting of greenhouse grown tomatoes in New Castle, Utah. The Troy Hygro business in Utah has failed, and Troy Hygro now attempts to blame all of its woes on State Bank.

There are three separate loans in issue. The Borrowers allege six separate counterclaims, and four separate affirmative defenses, some of which apply to more than one loan. And, because the loans were given at different times and under different circumstances,

the issues in relation to each vary. The trial court carefully and meticulously considered each claim, as applied to each separate loan, and entered its rulings. This Court must do likewise.

The three loans are: a loan made on October 7, 1985, in the amount of $325,000; a loan made on February 10, 1987, in the amount of $60,000; and a loan made on November 7, 1988, in the amount of $49,000. The three loans were all to the same parties and were secured by the same collateral. The loans went into default, and on December 13, 1990, State Bank filed its Complaint to collect the loans and to foreclose the collateral securing them.

The Defendants filed their Answer and Counterclaim on June 7, 1991. The Counterclaim alleges seven separate causes of action. The seventh, which is for accounting and declaratory and injunctive relief was dismissed by stipulation of the parties. Thus, six causes of action of the Counterclaim are before this Court for review, all of which will be discussed in detail below:

1. **Breach of Agreement to Fund.**
2. **Willful Breach of Contract and Economic Duress.**
3. **Promissory Estoppel.**
4. **Negligent Structuring and Disbursal.**
5. **Control and Self Dealing.**
6. **Breach of Duties of Good Faith and Fair Dealing.**

The Defendants also asserted affirmative defenses to State Bank's claims. They have attempted to veil the precise issues relating to the affirmative defenses by improperly combining them

with the counterclaim issues together under one general analysis. For example, at page 7 of their Brief, the Appellants state, in relation to the affirmative defenses:

> Claims [similar to the counterclaim] were asserted by way of affirmative defenses contained in Troy's answer.

This is not totally correct, and the differences could be important. As a matter of fact, even though there were many affirmative defenses originally pled by the Appellants, only four were plead as both affirmative defenses and counterclaims, those being breach of fiduciary duty (tenth defense), breach of duties of good faith and fair dealing (eleventh defense), economic duress (fourteenth defense) and improper disbursement (seventh defense).

After discovery, State Bank filed a Motion for Partial Summary Judgment seeking the dismissal of the Defendants' counterclaim. State Bank sought dismissal under two separate arguments, first that the claims were time barred by the applicable statute of limitations and second that the Appellants had failed to make a *prima facie* case, as a matter of law. Argument was heard and the trial court carefully analyzed each cause of action of the Counterclaim, as applied to the law, and ultimately granted State Bank's Motion for Partial Summary Judgment on all causes but one. By order dated July 9, 1992, and entered July 16, 1992, the Court carefully articulated its findings (R-0490-0495). A copy of the trial court's July 9, 1992, Order is included in the Addendum as Exhibit A. The Order dismisses some of the causes of action on the

statute of limitations and some for failure to make a *prima facie* case as a matter of law. These counterclaims will be discussed in detail below.

State Bank then filed a Motion for Partial Summary Judgment on its Complaint. Troy opposed the motion arguing, among other things, that its affirmative defenses barred State Bank's action. The hearing was held on October 9, 1992, and, after taking the matter under advisement, the court granted State Bank's Motion for Partial Summary Judgment except for two issues. Contrary to the statement of the Appellant at page 10 of their Brief, the Court's dismissal of the Defendants' defenses was not entirely based upon the statute of limitations. The court's rulings on two of the four issues were based upon the Defendants' failure to make its case, as a matter of law. (See discussion under Point IV, below.) A copy of the trial court's November 13, 1992, Order is included in the Addendum as Exhibit B.

In granting both of the summary judgments, the trial court reserved the issue as to the amount of attorney's fees and the alleged improper disbursement of the February 10, 1987 loan. The trial was held on December 10, 1992, on those issues. At the trial, Troy Hygro did not present any evidence on any issues. Thus, the trial court ruled in State Bank's favor finding that there was no improper disbursement of the February 10, 1987 loan.

STATEMENT OF FACTS

1. Sometime in early 1985, Troy Hygro approached State Bank for the purpose of obtaining a loan for additional greenhouses to be constructed upon property which Troy Hygro leased. (R-1607 (Deposition of James Markell, p. 33)).

2. Each of the parties knew that the loan being sought was to be approved by the Small Business Administration of the United States Government ("SBA"). (R-466 (Affidavit of Michael R. Kehl, ¶ 6)).

3. Troy Hygro now claims that during this loan application process, State Bank committed and promised that the loan would be granted and funded immediately upon the approval by the SBA. However, even the testimony of the only two witnesses testifying for the Defendants in this case, Michael R. Kehl and James Markell, proves that no such promise or commitment was ever made. (See discussion under Point IA.2., below).

4. There is no written document of any kind which obligates State Bank to advance the loan immediately upon SBA approval, nor at any other specific time.

5. On September 3, 1985, the SBA issued its written authorization for the new loan. (R-381 (Affidavit of Leland O. Fife, ¶ 11)).

6. However, by the time the SBA approval was given, State Bank had other existing loans outstanding up to the maximum allowed by the regulatory limits governing State Bank. Therefore, State

Bank did not immediately lend the funds pursuant to the SBA approval. (R-381 (Fife Affid., ¶ 11)).

7. During the negotiations and processes to complete and obtain the SBA approval, State Bank did not know it would be out of money when the SBA approval was granted. The Bank's lending capacity varies from time to time, and there is no way the Bank could have known at any time significantly prior to September 3, 1985, that it would not have money to lend when the SBA approval was given. (R-381 (Fife Affid., ¶¶ 13-14)).

8. State Bank moved as quickly as it could to remedy the situation. Within thirty (30) days, the Bank had funds to lend and the loan was closed on or about October 7, 1985. (R-382 (Fife Affid., ¶ 15)).

9. By everyone's admission, immediately prior to Troy Hygro signing the loan documents on October 7, 1985, Troy Hygro was not obligated to complete the loan. Nevertheless, Troy Hygro elected to borrow the funds and executed the Note, Trust Deed and other loan documents. State Bank advanced the $325,000 on or about the date of the loan. (R-380 (Fife Affid., ¶¶ 7-8), R-1564, 1947 (Kehl Deposition, pp. 207, 379)).

10. To remedy cash flow problems, and to provide for capital purchases, on February 10, 1987, State Bank loaned an additional $60,000 to Troy Hygro. (R-382 (Fife Affid., ¶ 17)). The Defendants executed the Note and security documents to memorialize

the loan. (R-499-502. (Affidavit of Leland O. Fife dated August 13, 1992 ¶¶ 6-8)).

11. On November 7, 1988, the Defendants obtained another loan from State Bank for the purpose of facilitating the takeover of the business by one of the Kehl brothers, Keith Kehl, and his wife Karen Sue Kehl.

12. The Plaintiff filed this foreclosure action on December 13, 1990. The Defendants filed their Answer and Counterclaim on June 7, 1991.

13. The Plaintiff made a Motion for Partial Summary Judgment as to the issues raised in the Defendants' Counterclaim. The Defendants filed an affidavit and a memorandum opposing the motion. Argument was held on June 24, 1992. On July 9, 1992, the court entered its order dismissing the Counterclaim, except one part of one cause of action. (R-490-495).

14. Then, the Plaintiff made a Motion for Partial Summary Judgment as to its Complaint. The Defendants resisted the motion, primarily relying on their affirmative defenses. Argument was held on October 9, 1992. On that date, the court granted the motion, except for one part of one affirmative defense. (R-699-700).

15. Troy Hygro claims that the loan proceeds from the February 10, 1987, loan were improperly disbursed. This is the only issue that went to trial. At the trial, Lee Fife testified that the proceeds were properly disbursed consistent with the loan documents. (R-1285-1303 (Reporter's Trial Transcript, December 10,

1992)). Troy Hygro did not put on any proof as to the alleged wrongful disbursement of the February 10, 1987 loan.

SUMMARY OF ARGUMENTS

1. The trial court properly dismissed four of the six causes of action in the Counterclaim based upon the statute of limitations.

2. Even if the trial court erred in dismissing those four counterclaims based on the statute of limitations, the claims should be dismissed as a matter of law because the Defendants did not make a *prima facie* case which would entitle it to recovery.

3. The fifth and sixth causes of action of the Counterclaim were properly dismissed by the trial court because the Defendants failed to make a *prima facie* case.

4. The Defendants have failed to marshall the proof necessary to show that the trial court's rulings were not correct in relation to the affirmative defenses raised by the Defendants.

5. The arguments made by the Defendants in opposition to the Plaintiff's Motion for Partial Summary Judgment in relation to the affirmative defenses fail as a matter of law. The defenses in relation to the October 1985 loan and the February 1987 loan were never raised as affirmative defenses and thus should not be considered. Even if they are considered, they are barred by the applicable statute of limitations because they are in reality counterclaims, not defenses, and because the Defendants did not

make a *prima facie* case independent of the statute of limitations issues.

6. The Defendants did not establish a *prima facie* case in the trial court on their affirmative defenses of economic duress, and breach of duties of good faith, fair dealing and fiduciary duty, and thus the trial court's summary judgment overruling those affirmative defenses must be sustained.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON EACH OF THE COUNTERCLAIMS

This Court will notice a decidedly different approach between State Bank's Brief and Defendants' Brief. The Defendants fail to separately address the six separate causes of action in the Counterclaim, and the four separate affirmative defenses alleged in the Answer. The law requires that each separate claim be separately addressed. *Au v. Au*, 626 P.2d 173 (Hawaii 1981). Since the issues are fact sensitive to a degree, and since many involve separate analysis, the Respondent will address each of the Defendants' counterclaims one at a time. A copy of the Defendants' Answer and Counterclaim is included in the Addendum as Exhibit C.

A. First Cause of Action, Breach of Contract. Defendants first claim that State Bank was legally bound to disburse the initial $325,000 loan immediately upon SBA approval; in other words, that there was a **contract** obligating State Bank to fund the

loan immediately when SBA approval was given. (R-104, 107 (Counterclaim ¶¶ 7, 21-22)). There is no writing evidencing the obligation, and thus the claimed contract is oral. The trial court found that the breach alleged by the Defendants occurred on or about September 3, 1985, when the approval by the SBA was given to State Bank and State Bank did not advance the funds. (R-491 (Order dated July 9, 1992, ¶ 3)). The trial court further found that since there was no writing to evidence the obligation, the contract was oral and thus governed by the four-year statute of limitations. (R-491, 491a, 492 (Order dated July 9, 1992)).

Utah Code Ann. § 78-12-25 provides that the following have a four-year period of limitations:

> (1) An action upon a contract, obligation or liability not founded upon an instrument in writing.

The alleged cause of action accrued on September 3, 1985. The Counterclaim was not filed until June 7, 1991, some five years and nine months later. The fact that the Defendants' claims are asserted by way of counterclaim, rather than a complaint itself, makes no difference, since the statutes of limitation apply equally to both counterclaims and affirmative complaints. *See generally*, *Lindsay v. Woodward*, 5 Utah 2d 183, 299 P.2d 619 (1956).

The Defendants' only argument relating to the counterclaims asserts that the loan documents from the loan which was ultimately granted on October 7, 1985, are sufficient to constitute a writing so that the six-year provision of Utah Code Ann. § 78-12-23 apply.

Preliminarily, the Court should note that the Defendants state at page 24 of their Brief, that it is undisputed that State Bank agreed to have the funds available immediately upon SBA approval. That statement is absolutely false. It is disputed. State Bank denies that it ever agreed to fund the loan at any given time. The page reference cited by Defendants does not sustain the proposition stated.

The documents upon which the Defendants rely do not invoke the six-year statute of limitations for two reasons. First, the documents relate to an entirely different contract. The Defendants attempt to rely on the loan documents from the October 7, 1985, loan as the writings sufficient to engage the six-year statute of limitations. But, the contract which they claim was breached was not the loan itself, but a prior oral agreement to fund the loan at a specified time. The oral agreement claimed by Defendants was allegedly breached on September 3, 1985, when State Bank couldn't fund the loan when SBA approval was given. There are no documents relating to that agreement. The actual loan documents weren't even prepared until a month after the contract upon which Defendants' sue was allegedly breached and several months after it was allegedly entered. The loan documents from October 7, 1985, are part of different contract.

Secondly, even if it were all part of the same contract, the material terms of that contract claimed by Defendants (promise to fund the loan immediately upon SBA approval) is not written. If a

contract is part oral and part written, the statute of limitations regarding oral contracts applies. *Chilson v. Capital Bank of Miami, Florida*, 701 P.2d 903, 907 (Kan. 1985); *Moran v. Stowell*, 724 P.2d 396, 399 (Wash. App. 1986). In *Chilson v. Capital Bank of Miami, Florida*, *supra*, the court succinctly stated the controlling law:

> A contract which is partly in writing and partly oral is in legal effect an oral contract so far as the statute of limitations is concerned. The writing necessary to have the additional protection of the five-year statute must be full and complete in itself so as not to require proof of extrinsic facts to establish all essential contractual terms.

Id. at 907 (citations omitted).

At best, the contract alleged by Defendants is part oral and part written. It is treated as an oral contract and the four-year statute of limitations applies.

The Defendants rely exclusively on the case *Evans v. Pickett Brothers Farms*, 17 Utah 2d 375, 499 P.2d 273 (1972), for the proposition that any oral promises made while the parties were negotiating a written contract are within the six-year statute of limitations. The *Pickett Brothers Farms* case does not help the Defendants at all. While the contract in that case was prepared after the contract was allegedly entered, it contained all material terms, including the one sued upon. The documents relied upon by the Defendants do not contain the material term which they claim was breached and thus the four-year statute of limitations applies.

The trial court granted summary judgment on this cause of action based on the statute of limitations. Other grounds for dismissal were argued. The trial court never reached them because of its ruling on the statute of limitations. Even if this Court finds that the trial court erred in its statute of limitation ruling, the Defendants have failed to make their *prima facie* case and thus the dismissal must be upheld. See, e.g., *Global Recreation v. Cedar Hills Development*, 614 P.2d 155, 157 (Utah 1980) (trial court's decision can be sustained on grounds other than those relied on by trial court if grounds have been argued and briefed by both parties, were presented to trial court for adjudication, and do not require resolution of disputed factual issues). Cf. *Viehweg v. Thompson*, 647 P.2d 311, 314-315 (Idaho 1982) (error by trial court in ruling that counterclaim was barred by statute of limitations was harmless because of trial court's finding on comparative negligence).

1. THE ALLEGED CONTRACT FAILS BECAUSE THERE WAS NO MUTUALITY OF OBLIGATION.

In order for a contract to be binding, there must be mutuality of obligation; that is, each of the parties must be bound to their respective performance under the terms of the contract. The general rule is well stated as follows:

> [M]utuality of obligation is essential to the validity of an executory bilateral contract which is based solely on mutual promises or covenants and unless both parties are legally bound, so that each may hold the other liable for its breach, the contract lacks mutuality and neither party is bound.

Security Bank & Trust v. Bogard, 494 N.E.2d 965, 969 (Ind. App. 1986), *quoting* 17 C.J.S. Contracts § 100(1) (1963).

In this case, both State Bank and the Defendants acknowledge that the Borrowers were not bound at any point to complete the loan. (R-1947 (Kehl Deposition, p. 379), R-380 (Fife Affidavit, ¶ 9), R-1664 (Markell Deposition, p. 90), stating "I would say, we didn't have a commitment but they were committed")). In fact, when it was apparent that State Bank did not have the funds to loan Troy Hygro, the completed SBA package was given to Mr. Markell so that he could try to find financing using that package through another bank (SBA approvals are assignable). (R-1650-1653 (Markell Deposition, pp. 76-79), R-381 (Fife Affid., ¶ 12)). Since the Borrowers were not obligated to complete the loan, the requisite element of mutuality of obligation is not present, and there was no enforceable contract which could have been breached by State Bank.

The case *Security Bank and Trust Co. v Bogard*, 494 N.E.2d 965 (Ind. App. 1986), is virtually identical to the case at bar. In that case, a Mr. Bogard was a farmer in Indiana, who had done business with Security Bank and Trust for 33 years. As he had done for many previous years, Mr. Bogard went into the bank to take out his 1983 credit line. He was informed by the bank officers that because of prior years carry over losses, the bank would need additional collateral. There were discussions about the pledge of additional property, but the loan committee turned down Bogard's application. Bogard then attempted to find financing elsewhere,

but was unsuccessful. Some time later, the bank filed an action against Bogard because he was in default on existing promissory notes.

Bogard claimed that the bank breached an oral contract to renew his line of credit. The court held, as a matter of law, that there was no contract upon which a breach could be found because there was no mutuality of obligation. In so holding the court stated:

> Here, Bogard was not legally bound to borrow the money from Security. In fact, Bogard testified he unsuccessfully attempted to seek financing elsewhere in lieu of obtaining a loan from Security. Because Bogard had no obligation to obtain his financing from Security, any alleged contract between Security and Bogard lacked mutuality of obligation and was thus unenforceable.

Id. at 968. This is precisely the instant case. Any alleged contract fails as a matter of law because it lacked mutuality of obligation. A copy of the *Security Bank and Trust Co. v. Bogard* case is included in the Addendum as Exhibit D.

2. THE ALLEGED ORAL CONTRACT BETWEEN STATE BANK AND TROY HYGRO IS TOO INDEFINITE TO GIVE RISE TO A CONTRACT.

In order for an oral contract to exist, there must be an offer, acceptance, consideration, the terms must be definite, the parties must have a sufficient understanding of the terms of the contract so as to know what they are bound to do, and the existence of the contract must be established by clear, unequivocal and definite testimony, or other evidence of the same quality. See *Harmon v. Greenwood*, 596 P.2d 636, 639 (Utah 1979); *Oberhansley v.*

Earle, 572 P.2d 1384, 1386 (Utah 1977); *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976); *Morgan v. Board of State Lands*, 549 P.2d 695, 696 (Utah 1976). The burden of proving the existence of a contract is on the party seeking its enforcement. *Oberhansley, supra*, 572 P.2d at 1386.

There can be no contract unless the obligations of the respective parties are spelled out with sufficient definiteness to allow enforcement. *Oberhansley v. Earle, supra*, 572 P.2d at 1386; *Hansen v. Snell*, 11 Utah 2d 64, 354 P.2d 1070, 1072 (1960). An agreement that does not define the terms thereto cannot be enforced as a contract because lack of definiteness is equivalent to a failure of the meeting of the minds which is an essential element to the formation of a contract. *See, Efco Distributing, Inc. v. Perrin*, 412 P.2d 615, 616 (Utah 1966).

Courts have addressed the question of definiteness in the context of a loan agreement between a bank and a borrower. *Marine Midland Bank v. Herriot*, 412 N.E.2d 908 (Mass. App. 1980) (finding at summary judgment that there was no enforceable agreement where significant provisions of a new loan, such as the term of the loan, how it would be secured, ***manner and timing of disbursement***, events of default and the manner and timing of interest payments remained open) (emphasis added); *Calosso v. First National Bank of Pompano Beach*, 143 So.2d 343 (Fla. App. 1962) (there was no loan agreement where the essentials of the agreement, ***such as the time for***

advancement, time and method of repayment, and rate of interest were conspicuously absent) (emphasis added).

In summary, in order for an agreement to be binding, it must be sufficiently definite as to its terms and requirements to enable the court to determine what acts are to be performed and when performance is complete, so that the court can fix definitely the legal liability of the parties. *Lessley v. Hardage*, 727 P.2d 440, 446 (Kan. 1986). Even by the Defendants' testimony, the contract alleged in this case was not definite enough to be enforced.

Throughout their Brief, Defendants summarily state the key to their entire case, that State Bank "promised to have the funds available immediately upon SBA approval." (Brief of Appellants at 24). Yet there is no admissible evidence ***anywhere in the record*** stating that State Bank would fund the loan immediately upon SBA approval. Even the Defendants themselves don't say so. In his deposition, James Markell, the local Troy Hygro representative with whom most of the discussions with the bank took place, gives a chronological account of all things that were discussed between Troy Hygro and State Bank. As to the alleged agreement to make the loan and the advancement of funds, Mr. Markell testified:

> **A.** That up until approximately July of 1985, the discussions with the bank were preliminary, and Mr. fife was careful to make sure that everyone understood that there was no commitment to loan. (R-1607-1614, 1622-1624, 1629-1632 (Markell Deposition, pp. 33-40, 48-50, 55-58)).

B. Beginning in early July of 1985, the pressures began to set in as far as the time table was concerned, and Mr. Markell began to mention to Mr. Fife the urgency of getting the loan closed. (R-1637 (Markell Deposition, p. 63)).

C. Several times thereafter, Fife made the comments like "it looks pretty good." (R-1640-1642 (Markell Deposition, pp. 66-68)).

D. When the verbal SBA approval was given, Fife stated that it looked good, and that the bank would now do the formal application. (R-1642-1643 (Markell Deposition, pp. 68-69)).

E. **Thereafter**, several times Mr. Fife indicated that the loan would be coming soon. (R-1644-1645, 1647-1650 (Markell Deposition, pp. 70-71, 73-76)).

F. Markell assumed the loan would be granted consistent with the pro-formas and proposed construction schedule because no one ever told Troy that it wouldn't be. According to Mr. Markell, "Probably saying nothing says it all." Troy Hygro submitted pro-formas early in the application process which projected a commencement date of August 31, at the latest, and since no one at State Bank said those dates couldn't be met, the Defendants assumed they would be met. (R-1659-1660 (Markell Deposition, pp. 85-86)).

G. When the SBA written approval finally came, Mr. Fife advised Mr. Markell that the funds were not available, and that the bank would get the money, but he did not know when it

was going to be. (R-1649-1650, 1656 (Markell Deposition, pp. 75-76, 82)).

Copies of each of these pages from the Markell deposition are included in the Addendum as Exhibit E.

Similarly, in his deposition, Michael Kehl, the President of Troy Hygro, outlines what things the bank said to him or did which Troy Hygro claims rose to the level of obligation. He states:

A. The bank's commitment to lend was inherent in the schedules that had been provided. (R-1563 (Kehl Deposition, p. 206)).

B. It wasn't what the Bank said that forms the basis for the obligation, but what it didn't say. (R-1564 (Kehl Deposition, p. 207)).

C. The commitment was made as an integral part of the construction schedule provided as part of the loan application. (R-1953 (Kehl Deposition, p. 385)).

D. The agreement was implied because of the construction schedule. (R-1953 (Kehl Deposition, p. 385)).

E. There was not an exact conversation where the bank agreed to the construction schedule. (R-1954 (Kehl Deposition, p. 386)).

F. The Bank had every opportunity to advise Troy Hygro if the construction schedule was unrealistic, but never did. (R-1954 (Kehl Deposition, p. 386)).

G. The Bank never said that it could advance the funds in accordance with any construction schedule. (R-1954-1955 (Kehl Deposition, pp. 386-387)).

Copies of these pages from Michael Kehl's deposition are included in the Addendum as Exhibit F.

Defendants also cite the Affidavit of Michael Kehl (R-466) for their claim that State Bank promised to fund the loan immediately upon SBA approval. It too fails to state what they say it states. First of all, the affidavit states inadmissible conclusions rather than facts. State Bank objected to the affidavit at the time of hearing. (R-1104, 1105 (Reporter's Hearing Transcript June 24, 1992, pp. 3-4)). Secondly, to the extent that it is inconsistent with the deposition testimony, it should not be allowed. *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983). Finally, even if the affidavit is considered, all it says is that State Bank agreed to lend the funds "pending SBA approval." That is a far cry from the allegation that the funds would be advanced "immediately upon SBA approval."

As the Court can readily see, all of the proof relied on by Defendants is conclusory in nature, and constitutes nothing more than assumptions, predictions or expectations by Defendants. In summary, the Defendants' claim that they provided anticipated construction schedules to the bank in February, and the parties knew that SBA approval was required, and because the bank didn't say it couldn't meet the schedules or that it wouldn't advance the

funds upon SBA approval, that it was bound to do so. The cases hold to the contrary. The fact of the matter is, the bank was doing its best to get the loan completed as quickly as it could (R-382 (Fife Affidavit, ¶ 10)). There is a big difference between working toward schedules and being bound by them. The Defendants have not bridged that difference.

The first essential element of contract, that is definiteness of terms, is absent. Even taking the Defendants' claimed facts as true, there is no way that either the parties or this Court could determine what acts are to be performed and when performance is complete. Thus, the claimed contract fails, consistent with the cases outlined above. *Lessley v. Hardage*, 727 P.2d 440 (Kan. 1986).

In summary, the trial court's statute of limitations ruling was correct. And even if it was not correct, the contract fails because there was no mutuality of obligation, and because the alleged contract was not sufficiently definite even under the Borrowers' proof. The trial court's ruling should be upheld independent of the statute of limitation issues.

B. Second Cause of Action, Willful Breach of Contract and Economic Duress.

In their second cause of action, the Defendants restate their breach of contract argument, state that it is willful, and then state that the $325,000 loan and $60,000 loan were signed under economic duress. The allegation that the breach was willful adds

nothing to the claims under the first cause of action and no further mention need be made of it. The trial court found that the Borrowers did not meet the proof on their claim for economic duress and thus dismissed it. (R-0494 (Order dated July 9, 1992)).

The Utah Supreme Court has mandated proof of three elements in order to establish a claim of economic duress. *Heglar Ranch, Inc., v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980). Those elements are: (1) wrongful act by the acting party; (2) which puts initial party in fear; (3) compelling him to do something against his will. *See generally, Weisen v. Short*, 604 P.2d 1191 (Colo. App. 1979); *Frank Culver Electric, Inc., v. Jorgenson*, 664 P.2d 226 (Ariz. App. 1983); *Nord v. Eastside Association Ltd.*, 664 P.2d 4 (Wash. App. 1983).

The Defendants' claim of economic duress in these circumstances fails, as a matter of law, on two grounds.

1. THE ACTS OF THE BANK WERE NOT WRONGFUL.

The first element of a claim for economic duress requires that the actions of the acting party be wrongful. *Heglar Ranch, Inc., v. Stillman*, *supra* at 1391. In this case, the acts of State Bank were not wrongful. Mr. Lee Fife states that at all times he was doing his best to get the loan completed (R-380, 382 (Fife Affid., ¶¶ 10-15)). The Defendants admit that they were on good terms with Mr. Fife, that he tried hard to do things right, and that the Bank seemed to be doing its best to get the matter resolved. (R-1869, 1951 (Kehl Deposition, pp. 300, 383)). Appellants have not pointed

to any proof to show that the acts of the Bank were wrongful, thus the economic duress claim fails on the first element.

2. THE BANK DID NOT "COMPEL" TROY HYGRO TO DO ANYTHING.

Finally, the last element of a cause of action for economic duress, is that the acting party must compel the other to do something against his will. *Heglar Ranch, Inc., v. Stillman, supra* at 1391. In this case, State Bank did not compel Troy Hygro to do anything. To the contrary, Troy Hygro knew that the Bank was not compelling it to go through with the loan. (R-1947 (Kehl Deposition, p. 379)). State Bank even went so far as to give the completed SBA loan package to the Defendants so that they could try to get the loan somewhere else. (R-1650-1653 (Markell Deposition, pp. 76-79), R-381 (Fife Affid., ¶ 12)). Mr. Fife encouraged the Defendants to try to get financing elsewhere. (*Id.*) On these facts, it can hardly be said that State Bank "compelled" Troy Hygro to complete the loan in October of 1985.

The case *Heglar Ranch, Inc., v. Stillman, supra,* is conceptionally controlling on this case. In that case one Juanita Stillman had entered an agreement for the purchase of certain land located in West Jordan, Utah. The deal failed because she was unable to secure the financing with which to pay the purchase price and the escrow was therefore terminated. A short time later the party with whom she had been dealing advised her that they were still willing to continue the deal, but insisted on the imposition of additional conditions and covenants, including the execution of

a promissory note. The defendant Stillman balked at the additional conditions, but nevertheless went through with the transaction. She defaulted, and the plaintiff sued on the promissory note which was imposed as the additional condition. The defendant Stillman asserted economic duress as a defense to the promissory note.

The trial court granted summary judgment in favor of the defendant, and the decision was affirmed by the Utah Supreme Court. The Court stated:

> Moreover, defendants were not placed in such fear as would deprive them of their free will--by defendant Juanita Stillman's own admission, ***had they chosen to walk away from the negotiations, the only consequence thereof would have been the loss of whatever benefits the deal might have afforded them had it been closed. To label as "duress" such incentive to complete the transaction would have the effect of permitting any party to avoid a contractual obligation on the ground the performance was agreed to only because, in the absence of a promise, the party would be denied the benefit of the bargain.***

Id. at 1391-1392 (emphasis added). A copy of the *Heglar Ranch, Inc., v. Stillman* case is included in the addendum as Exhibit G.

In the instant case, like Juanita Stillman, the Defendants could have walked away from this transaction at any time. The only consequence would have been the loss of the benefit of the Plaintiff's loan. As is set forth in the language quoted above, to extend the meaning of being "compelled" to Plaintiff's claims would allow any party to any contract to claim economic duress, since presumably every contract is entered for the financial or other benefit of the contract. The Defendants were not compelled to act, and the trial court was correct in dismissing the economic duress

claim for the Defendants' failure to make a *prima facie* case, as a matter of law.

Had the trial court reached the statute of limitations issue, it would have imposed the four-year statute of limitations and would have dismissed the cause of action on that ground as well. Under the statutory scheme for limitation of actions in Utah, there are certain specifically stated periods for some types of action. Then, for those not specifically mentioned, there is a "catch-all" limitation of four years imposed. Utah Code Ann. § 78-12-25 (1992). Since there is no specific period of limitation for economic duress, it falls within the catch-all provisions of Utah Code Ann. § 78-12-25 and is four years. The cause of action obviously accrued when the notes were allegedly signed under economic duress on October 7, 1985, and February 10, 1987. The action was not filed by the Defendants until more than four years later. The claims of economic duress are barred by the statute of limitations and the trial court's finding and order must be upheld on this ground as well.

C. Third Cause of Action; Promissory Estoppel.

Defendants' third cause of action alleges that State Bank promised to loan the funds immediately upon SBA approval and then failed to do so. In some ways this cause of action simply rephrases the breach of contract claims under the first cause of action. The trial court found that the period of limitations for promissory estoppel was four years, and that the claimed cause of

action accrued when the Bank failed to disburse funds upon SBA approval. (R-491, 491a, 492 (Order dated July 9, 1992)). The statute of limitations for promissory estoppel is indeed four years under Utah Code Ann. § 78-12-25. Like the claim of economic duress, since there is no specific statutory period stated, it is covered by the four-year catch-all provision of Utah Code Ann. § 78-12-25. Once again, the claim was not asserted until five years and nine months after the alleged breach. The trial court's ruling is correct and must be upheld.

Even if the claim of promissory estoppel were not time barred, the Defendants did not make out a *prima facie* case of promissory estoppel, as a matter of law. Originally, promissory estoppel was merely a substitute for consideration in the formation of contracts generally. *See*, e.g., *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570 (1953). The doctrine has been expanded, however, to allow recovery in situations where at least two essential elements are present: (1) A definite promise made to another party; and (2) action or forbearance of a definite and substantial character on the part of the promisee. *Id,* at 575. The Defendants promissory estoppel claim fails, as a matter of law, because neither of these two essential elements are present.

1. THERE WAS NO PROMISE.

The first essential element of promissory estoppel is a promise. *Irwin Concrete, Inc., v. Sun Coast Properties, Inc.*, 653 P.2d 1331, 1337 (Wash. App. 1982); *See, Ravelo by Ravelo v. Hawaii*

County, 658 P.2d 883 (Hawaii 1983). In *Security Bank and Trust Company v. Bogard*, 494 N.E.2d 965 (Ind. App. 1986) (Exhibit D in Addendum), on facts almost identical to these, the court denied the plaintiff's promissory estoppel claims, as a matter of law, because there was no promise. The Court stated:

> We need not consider the last three of these elements [the elements of promissory estoppel] because *Bogard's* argument is fatally flawed on the first element--the existence of a promise.

Id. at 968.

In order for a promise to be enforceable under the doctrine of promissory estoppel it must be clear and unambiguous. The terms of the promise must be certain, as there can be no promissory estoppel without a real promise. Promissory estoppel cannot be based on preliminary negotiations and discussions or an agreement to negotiate the terms of a contract. *Keil v. Glacier Park Inc.*, 614 P.2d 502 (Mont. 1980).

In the instant case, by the Defendants' own admission, the Bank never made a promise as to when, or even if, the loan would ultimately be granted. (R-1954-1955 (Kehl Deposition, pp. 386-387)). The exact conversations which took place between the Bank and the Defendants are set forth in detail under Point IA.2., above. None of the statements which the Defendants claim were made by bank officers amount to a promise sufficiently unequivocal and definite to sustain a claim for promissory estoppel.

B. THERE WAS NO DETRIMENTAL RELIANCE BY THE DEFENDANTS.

Conceptionally, the heart of a claim for promissory estoppel is detrimental reliance by the promisee.

The case *Ravarino v. Price, supra,* contains a thorough and intelligent discussion of the element of detrimental reliance in the context of promissory estoppel. In holding that the conduct in that case was insufficient, as a matter of law, the Supreme Court stated that in order for reliance to be sufficient it must be in a situation where the promise was designed to and did in fact induce significant change of position by the promisee. *Id.* at 575, 576. *See also, Southeastern Equipment Co. v. Mauss*, 696 P.2d 1187 (Utah 1985) (holding that there could be no promissory estoppel where the party claiming it had not changed position to their detriment in reliance on the promise).

Other courts have also stressed the importance of the element of detrimental reliance. *Lucero v. Goldberg*, 804 P.2d 206 (Colo. App. 19990) (stating that an order to rise to the level of promissory estoppel there must be a tangible act or a relinquishment of some significant right in reliance on promise); *Gilbert v. City of Caldwell*, 732 P.2d 355 (Ida. App. 1987) (holding that the detriment suffered in reliance on the alleged promise must be substantial in an economic sense).

In the instant case, Defendants have not cited any evidence in the record to establish their reliance on the alleged promise. They did not change position, and they did not waive any rights or

claims which they previously had. They did gather information, obtain an appraisal and make general preparations, but this is done in every loan and hardly rises to the level of reliance required. And, it was all done before the Defendants claim there was a commitment. The trial court's dismissal of the promissory estoppel claim was proper both in statute of limitations grounds, and on the merits.

D. Fourth Cause of Action, Negligence.

In their fourth cause of action, the Defendants claim that State Bank was negligent in the structuring, processing and disbursal of each of the October 1987 loan and the February 1987 loan. The trial court found that the statute of limitations for negligence is four years under the provisions of Utah Code Ann. § 78-12-25. (R-0493 (Order dated July 9, 1992)). The Utah Supreme Court has repeatedly held that the statute of limitations for negligence is four years. *Davidson Lumber Sales, Inc., v. Bonneville Inv., Inc.*, 794 P.2d 11 (Utah 1990). Therefore, the court found that as to the loans of October 7, 1985, and February 10, 1987, the claims of negligence were time barred. The Defendants did not claim negligence in relation to the November 7, 1988 loan and none is argued in the Brief of Appellants before this Court (R-1191 (Reporter's Hearing Transcript, June 24, 1992)). Thus, without question, the trial court's dismissal of the fourth cause of action for negligence was proper.

E. Fifth Cause of Action, Control and Self Dealing, and Sixth Cause of Action, Breach of Duty of Good Faith and Fair Dealing.

The fifth and sixth causes of action of the Defendants' counterclaim will be addressed together since they are addressed together in the Defendants' Brief and since the issues in relation to them are essentially the same. In their Brief, the Defendants allege four separate facts which they claim give rise to the claims of control and self dealing, and breach of duties of good faith and fair dealing. First, they state that the Bank admitted that the $60,000 loan was to resolve the funding problem created by State Bank in connection with the $325,000 loan. This is absolutely incorrect. There is no citation to the record which accompanies the allegation, and there is certainly no proof in the record where State Bank admitted that the $60,000 loan was given to resolve the alleged delay in funding. Conclusory statements without citation to the record will not be considered by the Court. *Marchant v. Park City*, 771 P.2d 677, 682 (Utah App. 1989).

Secondly, the Defendants state that "State Bank materially changed the terms of the original loan documents." (Appellants' Brief at 26.) This statement implies that the documents were changed after they were signed. This is incorrect, at best. In his deposition, Michael Kehl admitted that the Defendants did not claim that the documents had been altered after signature. (R-1925-1928 (Kehl Depos. pp. 356-360)). The only allegation in relation to the November 7, 1988, loan, is that State Bank prepared

the documents with Troy Hygro as the borrower and Keith and Karen Sue Kehl as guarantors, instead of vice versa. Also, the Appellants allege that State Bank should not have insisted that Keith and Karen Sue Kehl guaranty the earlier loans as a condition to making the third loan. Once again, ***there is no proof in the record on these two allegations.***

Defendants claim that these things alone constitute an issue of fact as to State Bank's self dealing and breaches of duty of good faith. The trial court found as a matter of law that these claims did not rise to the level of improper control or a breach of good faith. (R-0494 (Order dated July 9, 1992)). Certainly the Bank has the right to insist on a guaranty from anyone it chooses. There is absolutely no proof in the record that State Bank exerted any improper pressure upon Keith Kehl and Karen Sue Kehl to guaranty the prior loans as a condition to granting the third loan. As to the claims that the guarantor and borrower are reversed on the loan documents for the November 7, 1988 loan, the documents were signed as is (R-507-509 (Third Fife Affid., ¶¶ 26-31)) and thus any claimed agreement that is inconsistent with the written documents is barred as a matter of contract law by the parol evidence rule. See generally, *Union Bank v. Swenson*, 707 P.2d 663 (Utah 1985). And, even if the claims weren't barred by the parol evidence rule, it makes no difference whether the parties are guarantors or principal obligors since they are both liable anyway. The findings of the trial court on this issue must be upheld.

Defendants next claim that there is an issue of fact as to whether a special or fiduciary relationship was developed between the Bank and the Defendants. (Brief of Appellants, pp. 27-28.) The Defendants' Brief states two alleged facts in support of the claimed fiduciary relationship. First, the Defendants claim that "Troy relied totally on the Bank's creative financing ideas to remedy the situation." (Brief of Appellants at 28). Second, "there is evidence that the Bank paid itself first from the proceeds of the November 7, 1988 loan, contrary to what was represented to the SBA and without full disclosure to Troy." (Brief of Appellants at 28). Both of these "facts" are alleged without reference to the record. State Bank has no idea what the basis of these alleged facts are, and is at a loss as to how to respond to the unsubstantiated claims. Utah R. App. P. 24(e) requires citation to the record. Defendants have not done so, Plaintiff is not aware of any facts in the record to substantiate the Defendants' claims, and they should not be allowed to rely on them. Arguments without citation to the record will not be considered. *Marchant v. Park City*, *supra*, at 682.

However, even if the facts as stated are true, they certainly do not give rise to a fiduciary relationship. Ordinarily, no fiduciary nor confidential relationship exists between a bank and its borrower. *Pulse v. North American Land title Co.*, 707 P.2d 1105 (Mont. 1985); *First National Bank of Meeker v. Theos*, 794 P.2d 1055 (Colo. App. 1990); *First Bank of Wakeeney v. Moden*, 681 P.2d

11, 13 (Kan. 1984). The Utah Supreme Court has imposed a difficult standard for finding a fiduciary relationship, stating that the involvement must be so drastic that the dependent party is unable to substitute his will for the party providing the guidance. *Von Hake v. Thomas*, 705 P.2d 766, 770 (Utah 1985).

Many cases have held, on facts involving a much greater relationship than those alleged in this case, that there is no confidential or fiduciary relationship between a bank and its borrower. *Pulse v. North America Land Title Company*, 707 P.2d 1105 (Mont. 1985) (finding no fiduciary relationship notwithstanding that the customer had had accounts with the bank for approximately 36 years, dealt with the loan department on a few occasions prior to the transaction in question, financed the purchase of their residence and a business with the bank, and had a few small loans insured by the Small Business Administration through that bank); *First National Bank of Meeker v. Theos*, 794 P.2d (Colo. App. 1990) (finding no confidential relationship notwithstanding the customer's claim that he reposed a special trust and confidence in the bank as a result of 20 years of prior dealings, plus a long-standing social relationship with the bank officer and receiving advice from the officer over the years); *Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985) (finding as a matter of law that no confidential relationship existed even though the customer was 82 years old and distressed over the imminent sale of the ranch he had owned for 40 years).

The meager facts presented by the Defendants, which are not substantiated by the record, do not rise to the level of a fiduciary relationship as a matter of law.

Finally, Defendants claim that State Bank was in a fiduciary relationship with Troy Hygro because it is the trustee on the Deeds of Trust securing the loans. This theory is flawed for two reasons. First of all, Defendants cite no authority which would obligate a trustee under a trust deed to a fiduciary obligation in its general dealings with the borrower. State Bank has been unable to find any Utah cases which even address such a proposition. Secondly, even if such a fiduciary relationship exists, the claims which the Defendants assert do not relate in any way to the trust deeds. They relate to other general dealings between the parties and not to the specific property or loans which the Defendants claim were improper.

POINT II

THE DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THE RULING OF THE TRIAL COURT WAS IN ERROR AND THUS THE RULING OF THE TRIAL COURT MUST BE UPHELD

The main argument made by the Defendants on appeal is that the trial court improperly ruled that the statute of limitations barred their affirmative defenses. Because the Defendants' arguments are not specific, their Brief gives the impression that all of the counterclaims were also raised as affirmative defenses. In reality, the Defendants only raised four claims in opposition to State Bank's Motion for Partial Summary Judgment. (R-0666-0675

(Appellants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment)). The four claims are: (1) failure to fund the $325,000 when processed; (2) economic duress; (3) negligent structuring and disbursal; and (4) breach of duties of good faith and fair dealing and control and self dealing. Of the four claims, two were not plead as affirmative defenses and should not be considered as such. Each will be discussed in detail below.

Defendants have completely failed to point to specific evidence in the record that raises a material issue of fact as to any of their affirmative defenses. Instead, Defendants have deceptively combined all of the court's numerous rulings into one argument which focuses entirely on their view of the law, while brushing aside the facts. Defendants' shotgun approach inaccurately portrays the trial court's October 9, 1992 ruling (which addressed the affirmative defenses) as one that hinged completely on the court's supposed finding that all of Defendants' defenses were barred by the statute of limitations. In doing so, Defendants have selectively chosen not to discuss the full factual basis for the court's ruling. And, as to the poorly supported facts which they state in their Brief, they fail to show how they are material. The Appellants have the duty to marshall the facts, and show the error of the trial court's ruling. *Marchant v. Park City*, *supra*, at 682. The Defendants have not done so and the dismissal of their affirmative defenses must be upheld.

POINT III

ALL DEFENSES RELATING TO THE 1985 LOAN AND THE 1987 LOAN WERE PROPERLY BARRED

The first and third arguments asserted by the Defendants in their Memorandum regarding the affirmative defenses duplicate the arguments made in the counterclaim that State Bank breached a contract to fund the $325,000 loan when SBA approval was granted, and that it negligently and improperly structured and disbursed the two loans. First of all, these two claims were never plead as affirmative defenses and thus should not even be considered. Utah R. Civ. P. 8 requires that all affirmative defenses be raised in the pleadings. Defendants have never sought to amend their answer to assert these claims as affirmative defenses, and they should not be permitted to do so on appeal. See *Girard v. Appleby*, 660 P.2d 245, 248 (Utah 1983) (Rule 15, permitting amendment of pleading, to be applied with less liberality when amendments are proposed during or after trial, rather than before trial).

However, even if this Court chooses to consider these claims as if they had been properly raised as affirmative defenses, the trial court's order granting judgment to State Bank over the affirmative defenses must be upheld, both because the claims are barred by the statute of limitations and because the Appellants have not established a *prima facie* case as a matter of law.

Even though it may be true that statutes of limitation generally do not apply to defenses raised by a party, it is not

true that all so-called "defenses" are equally shielded from applicable statutes of limitation. There are many instances when "defenses" are or should be dismissed because the basis for the claim is barred by a statute of limitation.

In this case, once the trial court determined that Defendants' claims relating to the October 1985 loan and the February 1987 loan were barred by the statute of limitations (discussed in detail above under Point I), it properly refused to consider any of those claims to be viable defenses to Plaintiff's Complaint. The general rules cited by Defendants regarding the application of statutes of limitation to defenses are inapplicable in this case.

A. Claims Barred by Statutes of Limitation Cannot be Brought as a Direct Action or as a Defense Under Utah Code Ann. § 78-12-44.

Utah Code Ann. § 78-12-44 expressly precludes the use of claims that are barred by the statute of limitations as affirmative defenses. Utah Code Ann. § 78-12-44 (1992) states:

> In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. ***When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense***. (Emphasis added).

The Utah Supreme Court construed the last sentence of § 78-12-44 as follows: "[A] reasonable interpretation of the last sentence of this statute would compel the conclusion that **any statute** which

bars a right of action is conclusive unless its operation is suspended by the specific provisions of § 78-12-44." *Yergensen v. Ford*, 16 Utah 2d 397, 402 P.2d 696, 697 (1965) (emphasis added).

According to the plain language of the last sentence of § 78-12-44 and the *Yergensen* court's interpretation, this statute is squarely controlling. The trial court's ruling on the statute of limitations issues is conclusive because in this case none of the provisions of § 78-12-44 suspended the operation of the statute of limitations. Defendants' claims are barred by the statutes of limitation, and thus are unavailable either as a cause of action or ground of defense.

Defendants incorrectly assume, without authority, that § 78-12-44 was enacted only to cover situations involving the effect of acknowledgments of liability or part payment on the tolling of the statutes of limitation. As the *Yergensen* court made clear, the provisions of the last sentence are applicable in all cases in which a statute bars a right of action ***unless*** the other provisions of the section suspend such an effect. In this case, no such suspension took place, meaning the trial court's ruling remained conclusive.

Defendants also inaccurately argue that their defenses were barred wholly because of the court's reliance on § 78-12-44. While it is true that Plaintiff argued that such should be the case, the court never affirmatively based its ruling on § 78-12-44. Rather, as was previously noted, the trial court concluded that summary

judgment was justified as to Plaintiff's first and second claims for relief because "no material issues [existed] with respect to the October 7, 1985 transaction." (R-699 (November 13, 1992 Order, ¶ 1)). Even if the trial court would have relied solely on § 78-12-44 in dismissing all of Defendants' claims and defenses relating to the 1985 transaction, the court's decision would have been well grounded in the law.

B. The Alleged Breach of the Commitment to Fund the October 1985 Loan Did Not Grow Out of the Transaction or Occurrence Sued Upon.

A defense is only shielded from the effects of a statute of limitations when the defense "arises out of the transaction sued upon." *Allis-Chalmers v. North Bonneville*, 775 P.2d 953, 955 (Wash. 1989). In delineating the circumstances under which a cause of action should be considered to "arise out of" or "grow out of" a transaction or occurrence, the Utah Supreme Court has declared that "a cause of action is founded upon an instrument in writing when the contract, obligation, or liability grows out of the written instrument, not remotely or ultimately, but ***immediately***." *Evans v. Pickett Bros. Farms*, 17 Utah 2d 375, 499 P.2d 273, 274 (1972) (emphasis added). Similarly, the Court has stated:

> "'But the cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. ***In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought.'***"

Petty & Riddle v. Lunt, 104 Utah 130, 138 P.2d 648, 651 (1942) (quoting *Patterson v. Doe*, 62 P. 569, 570 (Cal. 1900)).

Applying the foregoing principals to the present action, Defendants' defenses clearly do not arise immediately out of the loan transactions that form the basis for Plaintiff's claims and, therefore, are subject to the applicable statute of limitations. The loan documents contain no provision requiring Plaintiffs to fund the $325,000 loan when SBA approval was granted.

The trial court properly concluded that the October 7, 1985 loan documents and the alleged oral contract were independent agreements when it dismissed Defendants' counterclaims. (R-491a-492 (July 9, 1992 Order)). Defendants were actually seeking affirmative relief for alleged harms arising out of a separate and independent oral contract; that is, an alleged contract to make a loan at a specific time. All counterclaims relating to the separate alleged agreement were properly barred as defenses by the statute of limitations applicable to oral contracts.

It would take a considerable stretch to conclude that Defendants' claims arose out of the loan agreement. Nothing in the written agreement confirms or gives effect to the oral dealings of the parties. There is clearly no merger of the two separate causes of action and the issues surrounding the alleged oral contract are immaterial to the validity of Plaintiff's Complaint.

C. Each of Defendants' Claims Barred by the Statute of Limitations Was in Reality an Set Off, Not a Matter of "Pure Defense."

Courts universally recognize that "in the absence of a statute to the contrary, a demand pleaded by way of setoff, counterclaim or cross-claim is regarded as an affirmative action in most jurisdictions, and therefore, unlike a matter of pure defense, is subject to the operation of the statute of limitations." *Rochester American Ins. co. v. Cassel Truck Lines,* 402 P.2d 782, 786 (Kan. 1965); see also *Franciso v. Francisco*, 191 P.2d 317, 320 (Mont. 1948); *Jewell v. Compton*, 559 P.2d 874, 875-76 (Oregon 1977). "Set off" or "counterclaim" are defined as "a demand which the defendant has against the plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action. . . ." *Morris v. Achen Const. Co., Inc.*, 747 P.2d 1206, 1209 (Ariz. Ct. App. 1986) *reversed in part on other grounds*, 747 P.2d 1211 (Ariz. 1986) (citing *Black's Law Dictionary* 1146 (5th ed. 1979)).

Furthermore, according to the Utah Supreme Court, "[a]t law a party cannot use a matter as a set-off unless it is a legally subsisting cause of action in his favor and upon which he could maintain an independent action." *Reeve v. Blatchley*, 106 Utah 259, 147 P.2d 861, 864 (1944). Similarly, in Arizona, if the defendant is not entitled to obtain relief in a direct action, the defendant cannot assert setoff or counterclaim. *Occidental Chemical Co. v. Connor*, 604 P.2d 605, 607 (Ariz. 1979).

In this case, each of Defendants' counterclaims and related affirmative defenses is offensive in nature rather than purely defensive. The Defendants are unquestionably seeking affirmative relief for their claims. The trial court, as a consequence, correctly treated Defendants' claims as set offs barred by the statute of limitations rather than pure defenses shielded from statute of limitations. Under *Reeve*, Defendants are not entitled to claim set offs when there is no legally subsisting cause of action to support their claims. Regardless of what Defendants attempt to label their claims, the claims are in reality set offs and as such were appropriately barred by the trial court on statute of limitations grounds. In discussing this exact issue, the Supreme Court of Hawaii stated:

> The proper standard to determine the relevant limitation period is ***the nature of the claim or right, not the form of the pleading***.

Au v. Au, *supra*, at 177 (emphasis added).

The Defendants' reliance on *Seattle First National Bank, N.A. v. Siebol*, 824 P.2d 1252 (Wash. Ct. App. 1992) for the notion that their counterclaims should have been treated as defenses, not subject to statutes of limitation, is unfounded. The facts in *Siebol* and in the present case are easily distinguishable. In *Siebol* the defendant explicitly asserted as a counterclaim that the bank breached an oral contract to loan him a specified amount of money. *Id.* at 1254. At the same time he asserted the breach as an affirmative defense. *Id.*

The trial court in *Siebol* concluded that the counterclaim was barred by the statute of limitations, but granted a setoff on the affirmative defense for lost profits on a theory of promissory estoppel. *Id.* After hearing testimony on the matter, the trial court specifically found that the plaintiff bank represented to defendant that he could obtain loans for a specified amount and that the defendant had relied on the plaintiff's assurances in opening a business. *Id.* The court of appeals affirmed the decision noting that some defenses are not barred by the statute of limitations as long as the defense arises out of the transaction sued upon, goes to the justice of the plaintiff's claim, and the main action itself is timely. *Id.* at 1255. The appeals court was convinced that there was substantial evidence to support the trial court's finding that equitable offset was warranted based on the principles of promissory estoppel. *Id.* at 1256.

In the present case, unlike *Siebol*, there is no factual basis in the record to support a finding that any of Defendants' defenses are supported by substantial evidence. As was previously discussed under Point I, the alleged promises by State Bank were not clear and unambiguous as is required and there was no detrimental reliance by defendants. Further, Defendants' defenses do not arise out of the transaction sued upon. The promises made in *Siebol* were an integral part of the loan agreement between the parties which is not the case here. Finally, Defendants, unlike the defendant in

Siebol, did not raise their claims relating to the alleged oral promises as both affirmative defenses and counterclaims.

Defendants further reliance on *Jacobsen v. Bunker*, 699 P.2d 1208, 1210 (Utah 1985), for the proposition that a counterclaim can be set-off against the plaintiff's claim even though the defendant's claim is barred by a statute of limitations, is likewise inapplicable in this action. *Jacobsen* involved two sisters who each borrowed money from their father on promissory notes and who inherited shares of the balance remaining on each note after their father's death. The plaintiff brought an action against the defendant to recover the amount due. The defendant counterclaimed for the amount due on plaintiff's note. *Id.* at 1209. Because the notes were executed and payable in California, California law governed the outcome of the case. *Id.* Yet, because no California law existed on the matter, the court presumed the California law was the same as Utah's. *Id.*

The Supreme Court concluded that even though the defendants' counterclaim was barred by the statute of limitations, defendant could still offset against the amount owed the plaintiff. *Id.* at 1210. The court relied upon Utah Rule of Civil Procedure 13(i) to support its conclusion. Rule 13(i) provides:

> When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.

The Utah Supreme Court in *Salt Lake City v. Telluride Power Co.*, 82 Utah 607, 17 P.2d 281, 285 (1932), interpreted Rule 13(i)'s predecessor (Section 6578, Comp. Laws Utah 1917, which is identical to the present version in all material respects). The *Telluride* court emphasized that in order for Rule 17(i) to apply the two claims must be "coexistent and overlapping in point of time" or rather that both must be "subsisting claims before the statute of limitations has run against the other." 17 P.2d 281, 285 (Utah 1932); *see also Stewart Livestock Co. v. Ostler*, 99 Utah 240, 144 P.2d 276, 284 (1943).

Based on the foregoing, it is clear that in this case Rule 13(i) is inapplicable to the October 1985 loan. Defendants' claims against Plaintiff for its alleged failure to timely loan Defendants the $325,000 did not "coexist or overlap" with Plaintiff's claims. Defendants' claims were barred by the statute of limitations ***before*** Defendants' breached the repayment obligation under the loan. The statute of limitations for the alleged failure to fund the $325,000 loan expired on September 3, 1989. The Defendants didn't default under the $325,000 loan until February of 1990 (R-503 (third Fife Affid., ¶ 12)).

In addition to the foregoing, Rule 13(i) should also be construed to require that the defendants' claim must arise out of the transaction or occurrence that forms the basis of the plaintiff's claim before a defendant can offset one claim against

a plaintiff's co-existing claim. Such requirement would wisely prevent defendants from being able to obtain offsets regardless of whether the counterclaim has long been barred by the statute of limitations or has any connection whatsoever with the plaintiff's claims for relief. *See Lightcap v. Mobil Oil Corp.*, 562 P.2d 1, 13 (Kan. 1977) (noting that "an outlawed claim may be used as a setoff if it (a) coexisted with the plaintiff's claim and (b) arises out of the 'contract or transaction' on which the plaintiff's claim is based.").[1]

D. The Defendants have not made a *prima facie* case on these Affirmative Defenses.

Beyond the statute of limitations arguments, Appellants still have to prove a *prima facie* case to get past summary judgment. *J. Henry Jones Co. v. Smith*, 27 Utah 2d 225, 494 P.2d 526, 527 (1972) (defendant's claims of offset against stated purchase price were affirmative defenses upon which he has the burden of proof). The merits of these affirmative defenses are identical to their counterparts in the counterclaims and are discussed in detail under Point I, above. Whether as a counterclaim or as an affirmative defense, Appellants failed to prove their *prima facie* case at the trial court and the affirmative defenses must be overruled, as a

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[1] At one time, Utah and Kansas had essentially identical rules relating to co-existing claims. *See Telluride Power Co.*, 17 P.2d at 285. Kansas eventually amended its rule to explicitly include a requirement that the outlawed claim coexisted with the plaintiff's claim and arose out the contract that formed the basis of the plaintiff's claim. Though Utah's Rule does not contain the express language Kansas's rule does, its should be construed as though it does.

matter of law, notwithstanding the statute of limitations issues. Because space is short, and because the issues are identical, Respondent will not repeat all of the argument and analysis on the failure of the Defendants to prove a *prima facie* case, but rather incorporates herein by reference the arguments set forth under Point I, above.

POINT IV

THE CLAIMS FOR ECONOMIC DURESS AND BREACH OF DUTIES OF GOOD FAITH, FAIR DEALING AND FIDUCIARY DUTY WERE DECIDED ON THE MERITS BY THE TRIAL COURT, AND THE APPELLANTS DID NOT MAKE THEIR CASE AS A MATTER OF LAW

Because the Appellants' Brief is not issue specific, it gives the impression that all of the affirmative defenses were denied based on the statute of limitations. This is not the case. The second and fourth affirmative defenses argued by the Appellants in opposition to State Bank's Motion for Partial Summary Judgment, those being economic duress and the alleged breach of duties of good faith, fair dealing and fiduciary responsibility, were dismissed on the merits.

According to the trial court's July 9, 1992 Order, each of the corresponding claims in the Counterclaim was dismissed by the court on the merits because Defendants' failed to submit sufficient proof to sustain their claim. (R-0490-0495 (July 9, 1992 Order)).

Similarly, in considering the same issues as affirmative defenses, the trial court properly concluded, after hearing and

reviewing the factual record before it, that the Appellants had not met their burden of proof:

> I really don't -- you know, the same reasons that I ruled on the merits on the counterclaim I think are going to be applicable on the merits. At least some of those matters. The fair dealing, good faith and so forth, as defenses. And of course partial summary judgment can be granted with respect to a defense, either allowing it or excluding it. *And I don't really see factual bases for those things anymore as a defense as I saw as an independent cause of action.*

(R-1262 (October 9, 1992 Hearing, p. 68, emphasis added)).

Once again, because space is short, the merits of these two claims will not be repeated here. The issues are the same as they were in the counterclaims. The trial court ruled the same way, and this Court should uphold the trial court's ruling on these issues as affirmative defenses just as it should on the issues as counterclaims.

CONCLUSION

For the reasons stated above, State Bank respectfully requests that the decisions of the trial court be affirmed. State Bank should also be awarded costs and/or attorney's fees pursuant to Utah R. App. P. 33.

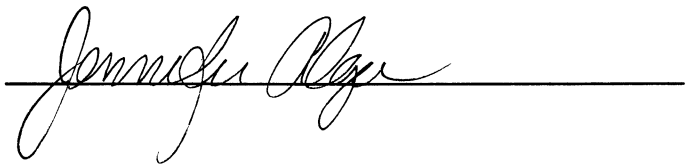
DATED this 30 day of December, 1993.

CHAMBERLAIN & HIGBEE

THOMAS M. HIGBEE
Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 30 day of December, 1993, two true and correct copies of the within and foregoing **BRIEF OF APPELLEE** were mailed, first-class postage prepaid, to Budge W. Call, BROWN & BROWN, Attorney for Defendants, 505 East 200 South, Suite 400, Salt Lake City, Utah 84102.



ADDENDUM

Tab A

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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR

IRON COUNTY, STATE OF UTAH

STATE BANK OF SOUTHERN UTAH, a Utah Banking Corporation, Plaintiff, vs. TROY HYGRO SYSTEMS, INC., MICHAEL R. KEHL, GLORIA F. KEHL, DONALD K. KEHL, LENORE F. KEHL, KEITH KEHL, KAREN SUE KEHL and JOHN DOES 1 through 10, Defendants.	**ORDER** Civil No. 900901153 Judge Robert F. Owens
TROY HYGRO SYSTEMS, INC., MICHAEL R. KEHL, GLORIA F. KEHL, LENORE F. KEHL, KEITH KEHL and KAREN SUE KEHL, Counterclaimants, vs.	

STATE BANK OF SOUTHERN UTAH,)
a Utah Banking Corporation,)
)
Counterclaim Defendant.)

This matter came before the Court on Wednesday, June 24, 1992, on the Plaintiff's Motion for Partial Summary Judgment as to the Counterclaim of the Defendants. The matter was heard by the Honorable Robert F. Owens, District Court Judge by assignment. The Plaintiff appeared by and through its attorney of record, Thomas M. Higbee, and the firm of Chamberlain & Higbee. The Defendants appeared by and through their attorney of record, Budge W. Call, BROWN & BROWN. The Court listened to the arguments of counsel, and reviewed the affidavits and discovery. Being fully advised in the premises; now therefore the Court enters its

FINDINGS

1. On or about October 7, 1985, State Bank of Southern Utah, a Utah banking corporation, granted a loan to Troy Hygro Systems, Inc., guaranteed by the other Defendants, in the amount of $325,000.

2. The Defendants have alleged breaches in connection with the above-referenced loan. Specifically, the Defendants allege that State Bank failed to timely and properly grant the loan pursuant to a prior agreement to do so.

3. The alleged breaches occurred on or about September 3, 1985, when the approval by the Small Business Administration was given to State Bank and State Bank did not advance the

funds. The statute of limitations for all claims relating to the Bank's failure to timely and properly grant the loan and disburse the funds accrued on September 3, 1985.

4. The alleged breach of agreement to grant the $325,000 loan upon SBA approval, and all other claims relating to the $325,000 loan, are not founded on an instrument in writing.

5. The actual loan granted October 7, 1985, is independent of the alleged obligation to grant a loan or to perform in any other way, prior to that date. Thus, the documents relating to the October 7, 1985, loan do not constitute a writing sufficient to satisfy the statute of limitations as to anything that happened prior thereto. There is no merger of the two independent contracts.

6. The transactions regarding the $325,000 loan, and the alleged breaches in connection therewith, are independent of the subsequent loans and dealings between the same parties. Therefore, nothing that happened after the alleged breaches relating to the $325,000 loan in October of 1985 could extend the accrual date for the statute of limitations relating thereto, and attempts to include these transactions with later transactions for the purposes of determining the commencement of the statute of limitations are not within the law.

7. There is no unequivocal reaffirmation or repromise by State Bank subsequent to the alleged breaches in relation to the $325,000 loan. And, the Court finds that the doctrine of reaffirmation as relied on by the Defendants applies only to contracts for the payment of money or other liquidated obligations and thus is not applicable to the claims in this case.

8. On or about February 10, 1987, State Bank granted an additional loan to Troy Hygro, and the other Defendants as guarantors, in the amount of $60,000. The funds were fully disbursed on or before February 20, 1987.

9. There is an issue of fact as to whether State Bank properly disbursed the funds from the February 10, 1987, loan, in the amount of $60,000.

10. The claim regarding the failure of State Bank to properly disburse the funds from the February 10, 1987, loan, is founded upon an instrument in writing since it involves the issue of performance of the loan and obligations associated therewith, which are written.

11. Therefore, the six-year statute of limitations regarding contracts founded upon instruments in writing applies to the breach of contract claim for the alleged failure to properly disburse the funds in connection with the February 10, 1987, loan.

12. The claims for negligence, also relating to the disbursal of the February 10, 1987 loan, are governed by the four-year statute of limitations applicable to negligence claims. The breach accrued on or before February 20, 1987, when the funds were fully disbursed. The applicable four-year statute of limitation regarding the negligence claims began running on that date.

13. The Defendants' claims for breach of duty of good faith, and unauthorized control over the affairs of Troy Hygro, consist of three distinct and separate transactions, each related to the three loans at issue herein. The three loans are the $325,000 loan granted on October 7, 1985, the $60,000 loan granted on February 10, 1987, and a loan in the amount of $49,000 granted on or about November 9, 1988.

14. As to each separate claim for breach of duty of good faith and unauthorized control, the causes of action accrue, and the statute of limitations begins to run, when the action was allegedly taken by the Bank and the alleged damage occurred. In each case, as relating to the three separate transactions here, the statute of limitations began to run when the respective loans were given. These claims for breach of duty of good faith and unauthorized control are governed by the applicable four-year statute of limitations.

15. The claims for breach of duty of good faith, and improper control, are barred by the four-year statute of limitations as to the transactions relating to the October 1985 loan and the February 1987 loan, and the transactions associated therewith. The breaches of good faith and improper control are not barred by the statute of limitations for the loan of November, 1988, and the transactions associated therewith.

16. However, the Defendants have not submitted sufficient proof to support a legal theory relating to the claims of improper control and breach of duty of good faith. The claims relating to improper control and breach of duty of good faith should therefore be dismissed, with prejudice, except that the dismissal shall be without prejudice insofar as it relates to the obligations of Keith Kehl, and the issue whether he was misled by Plaintiff to his damage in the papers he signed.

17. The Defendants have also not submitted sufficient proof to sustain their claim for economic duress, as a matter of law, and all economic duress claims should therefore be dismissed.

18. The Seventh Cause of Action should be dismissed upon stipulation of the parties.

The Court having entered its Findings;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that State Bank's Motion for Partial Summary Judgment is hereby granted in part and denied in part as follows:

1. The Defendants' First Cause of Action should be and hereby is dismissed, with prejudice and on the merits, except for the Defendants' contract claims for wrongful disbursement of the February 10, 1987 loan in breach of the written contract, which are not dismissed.

2. The Defendants' Second Cause of Action should be and hereby is dismissed, with prejudice and on the merits, in its entirety.

3. The Defendants' Third Cause of Action should be and hereby is dismissed, with prejudice and on the merits, in its entirety.

4. The Defendants' Fourth Cause of Action should be and hereby is dismissed, with prejudice and on the merits, in its entirety.

5. The Defendants' Fifth Cause of Action should be and hereby is dismissed, with prejudice and on the merits, in its entirety; provided, however, that insofar as it relates to the liability of Keith Kehl, and the issue whether he was misled by the Plaintiff to his damage in the papers he signed, the dismissal is without prejudice.

6. The Defendants' Sixth Cause of Action should be and hereby is dismissed, with prejudice and on the merits, in its entirety.

7. The Defendants' Seventh Cause of Action should be and hereby is dismissed, with prejudice and on the merits.

DATED this 9 day of July, 1992.

ROBERT F. OWENS
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of July, 1992, a true and correct copy of the within and foregoing **ORDER** was mailed, first-class postage prepaid, to Budge W. Call, BROWN & BROWN, Attorney for Defendants, 505 East 200 South, Suite 400, Salt Lake City, Utah 84102.

Secretary

Tab B

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE BANK OF SOUTHERN UTAH a Utah Banking Corporation, Plaintiff, vs. TROY HYGRO SYSTEMS, INC.; MICHAEL R, KEHL; GLORIA F. KEHL LEONORE F. KEHL; KEITH KEHL; KAREN SUE KEHL AND JOHN DOES 1through 10, Defendants	ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO PLAINTIFF ON COMPLAINT CASE NO. 900901153
TROY HYGRO SYSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL, Counterclaimants vs. STATE BANK OF SOUTHERN UTAH a Utah Banking Corporation, Counterclaim Defendant	

Plaintiff's motion for summary judgment on the entire complaint (partial in the sense that issues remained on the counterclaim) was argued on and taken under advisement. The court now rules as follows: Oct 9, 1992

1. Consistent with the findings in the previous order filed July 16, 1992, the court finds no material issues with respect to the October 7, 1985 transaction and grants summary judgment on the first and second claims for relief in the complaint, for the

amounts claimed therein and set forth in plaintiff's motion for partial summary judgment dated August 13, 1992, except for the issue of attorney's fees.

2. With respect to claims three and four, summary judgment is granted to plaintiff on all issues relating to the February 10, 1987 loan except for the issues involving defendant's seventh defense, improper disbursement of loan funds, which will be tried, as well as the issue of attorney's fees.

3. Summary judgment is granted to plaintiff on claims five, six, and seven, except for the issue of attorney's fees,

Dated this 13 of November, 1992.

ROBERT F. OWENS, Judge by Appointment
Fifth District Court

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of November, 1992, a true and correct copy of the within and foregoing ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO PLAINTIFF ON COMPLAINT was mailed, first-class postage prepaid to Charles C. Brown, Jeffrey B. Brown, and Budge W. Call, BROWN & BROWN, Attorneys for Defendants and Counterclaimants, 505 East 200 South, Ste 400, Salt Lake City, Utah 84102 AND Thomas Higbee, CHAMBERLAIN & HIGBEE, Attorneys for Plaintiff, 250 South Main Street, P.O.Box 726, Cedar City, Utah 84721-0726. Hand Delivered to both attorneys in the courtroom, Hall of Justice Building in Cedar City

R Felstead
Deputy Clerk

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Tab C

Charles C. Brown (1446)
Jeffrey B. Brown (0457)
Budge W. Call (5047)
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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, STATE OF UTAH

STATE BANK OF SOUTHERN UTAH, a Utah Banking Corporation, Plaintiff, vs. TROY HYGRO SYSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL; LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL and JOHN DOES 1 through 10, Defendants.	ANSWER AND COUNTERCLAIM
TROY HYGRO SYSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL; LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL, Counterclaimants vs. STATE BANK OF SOUTHERN UTAH, a Utah Banking Corporation, Counterclaim Defendant.	Case Number 90 0901153 (R.#911100008)

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The defendants hereby answer and otherwise respond to plaintiff's complaint as follows:

FIRST DEFENSE

Plaintiff's complaint fails to state a claim against the defendants upon which the relief can be granted.

SECOND DEFENSE

Defendants respond to the numbered allegations of plaintiff's complaint as follows:

1. In answering paragraph 1 of plaintiff's complaint defendants can neither confirm nor deny the allegations and therefore deny the same.

2. In answering paragraph 2 defendants admit that Troy Hygro Systems, Inc. is a Wisconsin Corporation, but deny the remaining allegations.

3. In answering paragraph 3 defendants admit that Michael R. Kehl, Gloria F. Kehl, Donald K. Kehl, Lenore F. Kehl, Keith Kehl and Karen Sue Kehl are individuals residing outside the State of Utah but deny the remaining allegations.

4. In answering paragraph 4 defendants deny the same.

5. In answering paragraph 5 defendants admit that Troy Hygro Systems, Inc. and Donald K. Kehl are owners of real property located in Utah but deny the remaining allegations.

6. In answering paragraph 6 defendants deny the same.

7. In answering paragraphs 7 through 8 defendants deny the same.

8. In answering paragraph 9 defendants admit that the terms and conditions of the alleged Note were modified and assert that said modifications were to material terms of the Note and were made subsequent to the execution of any alleged guarantees of the Note by the defendants, defendants deny the remaining allegations.

9. In answering paragraphs 10 through 13 defendants deny the same.

10. In answering paragraph 14, defendants incorporate their answers to paragraphs 1 through 13 above by reference.

11. In answering paragraphs 15 through 19 defendants deny the same.

12. In answering paragraph 20 defendants admit that this court does not have jurisdiction over property located in the State of Wisconsin, the defendants deny the remaining allegations.

13. In answering paragraphs 21 through 38 defendants deny the same.

14. In answering paragraph 39 defendants admit that the terms and conditions of the alleged Note were modified and assert that said modifications were material and subsequent to

the execution of any alleged guarantees on the loan by the defendants, defendants deny the remaining allegations.

15. In answering paragraphs 40 through 42 defendants deny the same.

16. In answer to paragraph 43, defendant's incorporate their answers to paragraphs 1 through 42 above by reference.

17. In answering paragraphs 44 through 69 defendants deny the same.

18. In answering paragraph 70, defendants incorporate their answers to paragraphs 1 through 69 above by reference.

19. In answering paragraphs 71 through 108 defendants deny the same.

THIRD DEFENSE

Plaintiff has modified or otherwise materially altered the alleged Promissory Notes and other loan documents making the same unenforceable.

FOURTH DEFENSE

To the extent to the alleged Promissory Notes have not been paid, conditions precedent to any liability of the defendants have not been met by the plaintiff.

FIFTH DEFENSE

The alleged Promissory Notes executed by Defendants were pursuant to proper release and disbursement of loan proceeds by plaintiff, any alleged amount owing is a result of plaintiff's breach of those terms barring plaintiff from further recovery and foreclosure.

SIXTH DEFENSE

The alleged Promissory Notes and guarantees are void for lack of/or failure of consideration.

SEVENTH DEFENSE

The defendants did not receive proper disbursement of the funds by plaintiff under the terms of the Promissory Notes and other loan documents.

EIGHTH DEFENSE

Plaintiff's claims are barred by the doctrines of laches, waives and or estoppel.

NINTH DEFENSE

Subsequent to Defendants' alleged execution of the Guarantees, plaintiff materially modified the alleged Notes and other loan documents thereby releasing the defendants as alleged guarantors.

TENTH DEFENSE

Plaintiff's relationship with defendants rose to a fiduciary relationship, plaintiff breached its fiduciary duty with the defendants in execution of the Promissory Notes, Security Agreement, Guarantees and other loan documents.

ELEVENTH DEFENSE

Plaintiff breached its duty to deal with the defendants in good faith and with fair dealing.

TWELFTH DEFENSE

This court has no jurisdiction to order foreclosure on real property located in Wisconsin.

THIRTEENTH DEFENSE

Plaintiff is precluded under Utah law from simultaneously foreclosing an all real and personal property.

FOURTEENTH DEFENSE

Defendants' alleged execution of the loan documents was under economic duress as a result of plaintiff's actions.

FIFTEENTH DEFENSE

As a result of plaintiff's actions the loan documents are unconscionable and therefore unenforceable.

WHEREFORE, defendants pray as follows:

1. For an order dismissing plaintiff's complaint with prejudice.

2. For an order awarding defendants their attorney's fees and costs.

3. for an order awarding such relief as the court deems equitable in the premises.

COUNTERCLAIM

Defendants Troy Hygro Systems, Inc. (Troy), Michael R. Kehl, Gloria F. Kehl, Donald K.Kehl, Lenore F. Kehl, Keith Kehl, and Karen Sue Kehl, hereby assert counterclaims against the plaintiff, State Bank of Southern Utah (State Bank) as follows:

1. Plaintiff and counterdefendant State Bank of Southern Utah (State Bank) is a banking corporation organized under the laws of Utah, doing business in Iron County, Utah.

2. Defendant and counterclaimant Troy Hygro Systems, Inc. (Troy) is a corporation organized in Wisconsin currently doing business in Iron County Utah.

3. Lee Fife is assistant Vice President and loan officer at State Bank and at all times relevant hereto was active in the Troy Hygro account with State Bank.

4. Troy is in the business of growing and marketing a unique tomato. The tomato is grown in a greenhouse using a hydroponic growing system. Troy began operations in East Troy Wisconsin. In 1985 Troy looked to expand its operation in Utah and Colorado.

5. In August of 1985 to facilitate funding for the purchase of property, plant and equipment, in New Castle, Utah, a request was made to the SBA in Salt Lake City seeking the guarantee of a loan to be made to Troy Hygro by State Bank of Southern Utah in the amount of $325,000.00.

6. It was imperative to Troy to receive the funds in August or early September, at the latest, so construction could start on the new facility and a tomato crop could be planted by early October to grow during the winter months.

7. State Bank was aware of the time restrictions placed on Troy and committed to loan Troy the amount of $325,000.00 upon approval by the SBA.

8. In early September of 1985 the SBA approved the loan in the amount of $325,000.00.

9. After the SBA approved the loan, however, State Bank refused to make any disbursements to Troy as promised and it is believed that State Bank did not have the money to loan to Troy.

10. State Bank requested that Jim Markell, an employee of Troy, to take the loan package, already approved by the SBA, and go down the street in Cedar City, Utah, and try to solicit it to other banks.

11. During this time, Troy already had a contractor lined up to commence with construction so that the facilities could be completed and a tomato crop planted for the winter growing season. However, because no disbursements were or could be made by State Bank as promised the construction had to be put on hold.

12. To obtain money for the initial disbursement of the $325,000 loan, State Bank had to sell the loan in the secondary market which created a further delay. It is believed that the funds provided to Troy actually came from the sale on the secondary market.

13. Defendant Troy to its detriment relied upon State Bank's promise and commitment to provide the necessary funds upon approval of the loan by the SBA.

14. State Bank finally made an initial disbursement on the loan in October 1985. However, because of the delay construction took place in the winter months and went longer than expected and as a result was more costly. As a result of the increased expenses and the late tomato crop Troy was placed in a financial bind.

15. Because of the additional expenses and crop delays an additional $60,000 was necessary to complete the project.

16. State Bank knowing the financial position and hardship of Troy as a result of the delays and actions of the Bank, solicited an extra loan for $60,000.00 to Troy in order to complete the original project.

17. In order to obtain the necessary $60,000.00 State Bank not only required Troy and the defendants to execute a Note in the sum of $60,000.00, but further required additional security and guarantees from the defendants on the original loan.

18. As a result of State Bank's failure to disburse the necessary money as previously committed Troy was in need of additional funds to complete the project. State Bank continued to solicit loans from the defendants and sought additional guarantees from the defendants.

19. In November of 1988, subsequent to the guarantees executed by the defendants, State Bank altered the material terms

of the loan documents, including the terms of the Note for $325,000.00 and the terms of the Note for $60,000.00.

FIRST CLAIM FOR RELIEF
Breach of Agreement to Fund

20. Defendants hereby incorporate paragraphs 1 through 19 above herein by this reference.

21. Through out the course of Troy's dealing with State Bank, State Bank made various promises and commitments to Troy and the defendants, including but not limited to the promise to loan $325,000.00 upon approval of the SBA.

22. State Bank wrongfully breached its promises to the damage and detriment of the defendant Troy in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF
Willful Breach of Contract and Economic Duress

23. Defendants hereby incorporate the allegations in paragraphs 1 through 22 above herein by this reference.

24. Through out the course of Troy's dealing with State Bank, State Bank made various promises to and commitments with Troy and the defendants, including but not limited to the commitment to provide a construction loan of $325,000.00 upon approval by the SBA. State Bank knew or should have known that Troy and the defendants would reasonably rely upon these promises and change their position as result of said promises.

25. Troy and the defendants did reasonable and justifiable rely upon the promises of State Bank and changed their position. The defendants based upon the commitment of State Bank placed themselves in a position where they relied completely on State Bank to do what it promised to do and had no reasonable alternatives but to rely on State Bank to perform its promises.

26. State Bank new or should have known of this reliance by Troy and the other defendants or State Bank was reckless knowing that defendants were without reasonable alternatives but to accept the dictates and demands of State Bank. State Bank willfully breached its agreements with the defendants and willfully placed additional demands and requirements on the defendants knowing the defendants had no alternative but to agree to any new change or demand placed upon them. These arrangements placed the defendants in economic duress where they had to either accept the proposal, dictates and demands made by State Bank or lose the project all together.

27. As a result of the willful breaches committed by the bank and economic duress placed upon the defendants the defendants had no choice but to execute additional Trust Deeds, personal guarantees, mortgages and other guarantees as the bank dictated.

28. As a result of the willful breaches committed by State Bank and economic duress placed upon the defendants, Troy and the defendants are entitled to a cancellation of the documents not consistent with their claims herein and an award of damages to be proven at trial.

THIRD CLAIM FOR RELIEF
Promissory Estoppel

29. Defendants hereby incorporate paragraphs 1 through 28 above herein by this reference.

30. Through out the course of Troy's dealing with State Bank, the Bank made various promises to Troy and the defendants as set forth above.

31. State Bank knew or should have known that Troy and the other defendants would reasonably rely upon these promises and change their position as a result of said promises.

32. In fact defendants in reasonable and justifiable reliance upon the promises of State Bank did substantially change their position and committed themselves to State Bank to provide funds to develop the project.

33. After Troy and the defendants changed their position and were in a position of total reliance upon the dictates of State Bank to fund the project, State Bank breached its promises with Troy and the defendants and repeatedly placed additional restrictions and conditions on the financing and required the

defendants to loan an additional amount from the Bank and execute additional guarantees all to the detriment and damage of the project and the defendants in an amount to be proven at trial.

FOURTH CLAIM FOR RELIEF
Negligent Structuring and Disbursal

34. Defendants hereby incorporate paragraphs 1 through 33 above herein by this reference.

35. State Bank had a duty to use good faith and due care in processing, structuring and in the disbursal of the financing, especially in light of the fact that State Bank was aware of the time constraints placed upon the project.

36. The Bank wrongfully or negligently processed, structured and disbursed the funds to Troy and the defendants.

37. The actions of State Bank and the problems experienced by the project bare out the fact that State Bank failed to properly disburse the funds when committed and placed the project in financial straits.

38. State Bank has breached its obligation to properly process, structure, and disburse funds under the loan commitment to the proximate damage of Troy and the other defendants in an amount to be proven at trial.

FIFTH CLAIM FOR RELIEF
Control and Self Dealing

39. Defendants hereby incorporate paragraphs 1 through 38 above herein by this reference.

40. As a result of the actions and conduct of State Bank, the Bank exercised such a degree of control over the project and the decisions of the parties that in fact the bank acted as a principal in the project.

41. In relation thereto State Bank at all times acted in its own self interest on the project and contrary to interest of Troy and the other defendants.

42. Such actions have resulted in damage to Troy and the other defendants in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF
Breach of Duties of Good Faith and Fair Dealing

43. Defendants hereby incorporate paragraphs 1 through 42 above herein by this reference.

44. Under the circumstances as set forth above, State Bank in its dealings had the general duty of good faith and fair dealing to the defendants.

45. The Bank breached its duties and as a result Troy and the other defendants have been damaged in an amount to be proven at trial.

SEVENTH CLAIM FOR RELIEF
Accounting, Declaratory and Injunctive Relief

46. Defendants hereby incorporate paragraphs 1 through 45 above herein by this reference.

47. Defendants are entitled to full and complete accounting from State Bank of all transactions complained of herein and to declaratory relief against the Bank construing the rights and obligations of the parties herein to the documents and other agreements among the parties, in light of the breaches, misrepresentations and omissions of the Bank set forth herein.

48. Defendants are further entitled to injunctive relief against the Bank in order to prevent irreparable injury to the project and a loss of the project and the land, preventing the Bank from attempting to foreclose or enforce any such documents until the matters herein can be fully adjudicated.

WHEREFORE, defendants pray on their counterclaim, that they be awarded damages in an amount to be proven at trial, that the court construe all documents between the parties as requested by the defendants and the court cancel the documents not consistent with the claims of the defendants herein and that the court grant an injunction preventing the plaintiff from seeking foreclosure or to enforce any of the documents until the rights of the parties heretofore are fully adjudicated, for attorneys fees and

costs, and for such other and further relief as a court deems just and equitable in the premises.

DATED this 31 day of May, 1991.

BROWN & BROWN

Budge W. Call

Budge W. Call

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of ~~May~~ June, 1991, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM to:

Thomas M. Higbee
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Bruce W. Call

Tab D

example in *Mottern v. State* (1984), Ind. App., 466 N.E.2d 488, the First District, finding no evidence of prejudice at all stated:

> "On the other hand, the state offered no evidence of prejudice such as unavailability of its witnesses, records, test results, or any other reason why it would be impossible or extremely difficult to present its case against Mottern at this time".

However, the issue has not been so clearly presented as it has been in the case at bar. Laches has been firmly engrafted upon the post-conviction rule, as a broad equitable doctrine, however it is in an evolutionary stage in this context.

Rule 9(a) of the Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254 enacted by Congress in 1976 incorporates the doctrine of laches into the law governing habeas corpus cases for the federal courts. It provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on ground of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Federal law is important in our considerations in this appeal, because it should govern this State when it decides whether or not to afford redress for a federal constitutional wrong, which this constitutionally invalid plea surely involves.

Prior to 1976 long delay in bringing a post-conviction claim to a federal court merely increased the burden on a petitioner. Congress in enacting Rule 9(a) took the same step this court took in *Twyman v. State, supra*, and placed the burden on the prosecutorial authorities to prove laches. The elements of laches in both state and federal courts are essentially the same: unreasonable delay by the petitioner and prejudice from that delay. However, the position of Congress is that the component of prejudice involves predudice to the state in its ability to meet the allegations of the post-conviction petition and not prejudice to the state in its ability to successfully retry the petitioner in the event post-conviction relief is granted. *Aiken v. Spalding* (9th Cir.1982), 684 F.2d 632, cert. denied, 460 U.S. 1093, 103 S.Ct. 1795, 76 L.Ed.2d 361 (1983). Chief Justice Burger, speaking for himself alone, has suggested in a separate statement to the denial of certiorari in the *Aiken* case that Congress amend rule 9(a) to permit prejudice to the ability of the state to retry the petitioner successfully to be made material to the question of delay prejudice. Congress has been reluctant in the past to deal with this question more harshly.

In this appeal the question is presented in a pristine form. The constitutionally infirm character of the plea and conviction is clear. That plea and conviction supports appellant's enhanced sentence which he is now serving for his more recent crime. While we have said many times that the enhancement of this newer sentence is not a new and additional punishment for the old crime; yet we know also that if this infirm plea and conviction is permitted to stand, appellant ". . in effect suffers anew from the deprivation . ." of his constitutional rights. *Burgett v. Texas* (1967), 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319. At this high level of judicial concern, and within this area of delayed claims, prejudice to the State's retrial capabilities should be declared insufficient.

GIVAN, C.J., and PIVARNIK, SHEPARD and DICKSON, JJ., vote to deny transfer.

DeBRULER, J., dissents to the denial of transfer with opinion.

SECURITY BANK & TRUST CO., Appellant (Plaintiff-Counter-defendant),

v.

Francis H. BOGARD, Appellee (Defendant-Counter-plaintiff).

No. 4-985A246.

Court of Appeals of Indiana, Fourth District.

June 30, 1986.

Bank brought action against farmer on seven promissory notes, and farmer counterclaimed alleging breach of contract to provide loan and promissory estoppel. The Superior Court, Vigo County, Division I, Michael H. Eldred, J., entered judgment for bank on promissory notes and for farmer on counterclaim. Bank appealed. The Court of Appeals, Miller, J., held that: (1) bank's alleged agreement to extend credit to farmer who was not legally bound to borrow money from bank lacked mutuality of obligation and, therefore, was unenforceable, and (2) statement by bank employee that he would take loan application to committee and that bank would soon have something for farmer was statement of intention and statement of prediction, and therefore, not a promise for purposes of promissory estoppel.

Reversed.

Conover, J., dissented and filed opinion.

1. Contracts ⇐10(6)

Bank's alleged agreement to extend credit to farmer who was not legally bound to borrow money from bank lacked mutuality of obligation and, therefore, was unenforceable.

2. Estoppel ⇐85

Doctrine of promissory estoppel requires promise which reasonably induces action or forbearance of definite and substantial character, and which needs to be enforced in order to avoid injustice.

3. Estoppel ⇐85

Mere expression of intention is not "promise" for purpose of doctrine of promissory estoppel or formation of contract.

See publication Words and Phrases for other judicial constructions and definitions.

4. Estoppel ⇐85

Prediction, opinion, or prophecy is not "promise" for purpose of doctrine of promissory estoppel or formation of contract.

5. Estoppel ⇐85

Statement by bank's employee that he would take loan application "to the loan committee and within two or three days, we ought to have something here, ready for you to go with" was expression of intention to take application to loan committee and also contained prediction of approval and, therefore, did not contain any "promise" as required for application of doctrine of promissory estoppel.

H. Brent Stuckey, Hart, Bell Deem, Ewing & Stuckey, Vincennes, for appellant.

Dennis R. Majewski, Terre Haute, for appellee.

MILLER, Judge.

Security Bank & Trust Co. sued Francis Bogard because he was in default on seven promissory notes. Bogard counterclaimed, alleging Security caused the default because it agreed to a loan for his farming operations and then refused to lend him any money. The trial court granted judgment to Security on the defaulted notes and to Bogard on his counterclaim for damages. Security appeals, challenging the trial court's conclusion that it was liable to Bogard either for breach of contract or under the doctrine of promissory estoppel.

We reverse.

FACTS

Security is a banking institution with its principal place of business in Vincennes, Indiana and a branch in Oaktown, Indiana. Bogard, a farmer in Sullivan County, had

EXHIBIT D-1

done business with Security since 1949. In the spring of each crop season, Bogard established a line of credit at Security which would advance money to Bogard for the payment of production expenses. Although repayment was to be made at harvest time, the notes were carried over many of the years because Bogard was unable to repay them.

Bogard's loans did not require approval by the loan committee of the bank for the first twenty or twenty-five years of their banking relationship. For the last eight or nine years, however, Bogard was aware his credit lines had to be approved by a loan committee in Vincennes at the main branch. Nevertheless, Bogard claimed that the previous Oaktown branch manager, Bruce Mayall, told him the loan committee acted upon his recommendation so that Bogard concluded the loan committee approval was simply a formality.

1981 and 1982 were two years of losses for Bogard. In 1982, Bogard was unable to pay his indebtedness for the year plus his carryover from the 1981 losses. At the conclusion of the 1982 crop season, Bogard continued to owe Security in excess of $28,000.

Bogard began negotiating with Michael Chestnut, the Oaktown Security branch manager, in January of 1983 to obtain financing for the 1983 crop year. Chestnut informed Bogard that Security would need additional collateral to secure the past indebtedness and the 1983 credit line because of the carryover losses from 1981 and 1982. In March, Chestnut and Bogard began discussing the possibility of real estate as a collateral for the loan. The two discussed the possibility of a mortgage on twenty-five acres of Bogard's farm land or his house and four acres. After the bank assistant took pictures of the property, Chestnut suggested a value of $1,500 per acre on the 25 acres of farm land for the security on the loan. In Bogard's words, Chestnut said, "Well, I'll take this to the loan committee and within two or three days, we ought to have something here, ready for you to go with." Record, pp. 124-25.

Chestnut later informed Bogard that the loan committee turned down the twenty-five acres as insufficient security. He informed Bogard that Security wanted the additional security of a first mortgage on the house and four acres, a second mortgage on the remainder of his farm, and a first mortgage on his crops and equipment Bogard was unwilling to comply with these terms.

Meanwhile, Bogard attempted to secure financing elsewhere. The FHA turned him down because he was not the sole operator of his own farm. He was also rejected by First National Bank of Terre Haute because he had three consecutive losses in his farming operations.

On July 15, 1983, Security sued Bogard because he was in default on seven different promissory notes totalling $29,982.72. Bogard counterclaimed, alleging Security agreed to extend him credit so that he could carry on his farming operations. He claimed that as a result of Security's failure to fulfill the promise, he was damaged as a result, including his failure to pay the defaulted notes. To support his claim of damages, Bogard testified that based on Security's representation, he had arranged to rent two hundred and fifty acres of soybean land, forty acres of additional watermelon ground, and equipment, all of which fell through due to lack of financing. He later admitted, however, that the reason he did not obtain the two hundred and fifty acres of soybean land was that the owner had previously rented the land for a two year period to another tenant the year before.

The trial court entered judgment for Security on its claim and Bogard on his counterclaim, and entered the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. That Plaintiff/bank and Defendant/counterplaintiff/Bogard had engaged in a course of doing business since 1949.

Cite as 494 N.E.2d 965 (Ind.App. 4 Dist. 1986)

2. That such business consisted of the bank loaning Bogard money to operate his farm in the coming year.

3. That from year to year Bogard paid his notes one year late, paying only current interest and then the principal the following year from that year's farm income.

4. That the parties had continued this practice for a number of years, perhaps as long as 35 years.

5. That by the admission of the bank's loan officer, Mike Chestnut, Bogard had been a "good customer".

6. That plaintiff had agreed to extend credit to Bogard for the farming year 1982.

7. That in 1982, without notice to Bogard, the bank decided not to extend said credit citing a change in bank policy as the reason.

8. That in disregard of prior practice and the regular course of business the plaintiff decided to enforce the terms of the notes as written.

9. That under the strict terms of the notes Bogard was in default.

10. That as a result of plaintiff's denial of credit for the farming year 1982, Bogard was unable to plant crops to make income and thus was unable to make any payments on the notes.

11. That as a result of the denial of credit for the year 1982, Bogard lost projected profits from the sale of soybeans, grain and watermelons.

12. That Bogard, in reliance of the promise of plaintiff, to extend credit and in reliance of his prior course of doing business with plaintiff entered into contracts and agreements with third parites [sic] to his detriment and damage.

CONCLUSIONS OF LAW

1. That plaintiff caused in whole or part defendant's breach on the notes.

2. By their actions over a large numger [sic] of years, and by oral modification, the parties modified the terms of the notes sued upon so that any party seeking a change could not do so unilaterally.

3. Strict performance of the terms of the notes was waived by plaintiff because their acts showed a relinquishment of several provisions of the notes.

JUDGMENT

It is hereby ordered that Defendant is in default on the notes sued upon and that Plaintiff shall have judgment as prayed.

It is further ordered that Defendant/counterclaimant have judgment on his counterclaim due to Plaintiff/counterdefendant bank's breach of contract.

Counterplaintiff has shown extensive damages, and the Court grants counterplaintiff judgment thereon, however, in the interests of justice and based upon the vicissitudes and speculative nature of farming income the Court grants judgment to counterplaintiff only to the extent that those damages offset the damages of Plaintiff. The Court thus finds both judgments are satisfied.

Costs to Plaintiff."

Record, pp. 75-76.[1]

Security appeals, challenging the sufficiency of the evidence in four areas of the trial court's findings and conclusions:

(1) That Security entered into a binding contract to extend Bogard credit for the 1983 crop year;

(2) That Security is liable on the basis of promissory estoppel;

1. As Security notes in its brief, conclusions of law 2 and 3—that the parties had modified the terms of the notes and that strict performance was waived by Security—are irrelevant conclusions because the trial court concluded that Bogard was in default and that Security should have judgment on the notes. Moreover, Bogard does not appeal the propriety of granting Security judgment on the defaulted notes so we need not consider any apparent conflict between the trial court's conclusions and the judgment with respect to Security's claim on the defaulted notes.

(3) That Chestnut, the branch manager, had apparent authority to bind Security to provide the line of credit for the 1983 crop year; and

(4) That Bogard's damages equaled the amount he owed Security on the defaulted notes.

We reach no consideration on the issue of Chestnut's apparent authority or the court's novel and innovative computation of Bogard's alleged damages because we find Security is not liable under the theory of breach of contract or of promissory estoppel.

DECISION

The crux of Security's first two issues—whether there was a breach of contract or promissory estoppel—centers on the trial court's findings of fact 6 and 12 and conclusion of law 1: that Security agreed to extend Bogard credit for the 1983 farm year;[2] that in reliance on Security's promise to extend him credit, Bogard entered into contracts and agreements with third parties to his detriment and damage; and that Security caused in whole or in part Bogard's breach on the notes. Because Security and Bogard are unsure of the exact theory the trial court used to arrive at its conclusion that Security was liable for Bogard's damages—either because Security entered into a valid contract with Bogard to extend him credit which it then breached or because it was liable upon the theory of promissory estoppel—we will address both issues.

Enforceability of Contract

[1] A fundamental concept of contract law is that a contract is unenforceable if it lacks mutuality of obligation—i.e., if it fails to obligate the parties to do anything. *Seco Chemicals, Inc. v. Stewart* (1976), 169 Ind.App. 624, 349 N.E.2d 733. The general rule is explained as follows:

"Mutuality of obligation is essential to the validity of an executory bilateral contract which is based solely on mutual promises or covenants and unless both parties are legally bound, so that each may hold the other liable for its breach, the contract lacks mutuality and neither party its bound. Thus, mutuality is absent when only one of the contracting parties is bound to perform, and the other party remains entirely free to choose whether or not to perform, and the rights of the parties exist at the option of one only."

17 C.J.S. *Contracts* § 100(1)(1963).

Here, Bogard was not legally bound to borrow the money from Security. In fact, Bogard testified he unsuccessfully attempted to seek financing elsewhere in lieu of obtaining a loan from Security. Because Bogard had no obligation to obtain his financing from Security, any alleged contract between Security and Bogard lacked mutuality of obligation and was thus unenforceable.

Promissory Estoppel

[2] Bogard also attempts to justify the trial court's judgment on the theory of promissory estoppel. While it is true that an otherwise unenforceable promise may be enforced under the doctrine of promissory estoppel, it is crucial to the promisee's cause that he establish the elements necessary for the doctrine to apply. Succinctly stated, the doctrine of promissory estoppel applies where there is: 1) a promise, 2) which the promissor should reasonably expect to induce action or forebearance of a definite and substantial character, 3) which does, in fact, induce such action or forebearance, and 4) injustice can only be avoided by enforcement of the promise. *Tipton County Farm Bureau Co-op v. Hoover* (1985), Ind.App., 475 N.E.2d 38. We need not consider the last three of these elements because Bogard's argument is fatally flawed on the first element—the existence of a promise.

[3, 4] Although it is recognized that no special form of words is necessary to create a promise, the mere expression of an intention is not a promise. 17 Am.Jur.2d *Contracts* § 3 (1964) (citing *E.I. Dupont De Nemours & Co. v. Clairborne-Reno Co.* (8th Cir.1933), 64 F.2d 224, *cert. denied*, 290 U.S. 646, 54 S.Ct. 64, 78 L.Ed. 561). Thus, where A says, "I am going to sell my house. I want $70,000 for it," he has made a mere statement of intention and not a promise. L. Simpson, *Contracts* § 2 (1965) (citing *Farina v. Fickus* (1900), 1 Ch. 331). Moreover, a prediction, opinion, or prophecy is not a promise. Calamari & Perillo, *Contracts* § 2-6 (1977). For example, when a father asked a doctor how long his son would be in the hospital and the doctor replied, "Three or four days, not over four," the doctor was not liable when the son remained in the hospital for over a month because the doctor had made a prediction and not a promise. *Id.* (citing *Hawkins v. McGee* (1929), 84 N.H. 114, 146 A. 641.

[5] Here, the trial court concluded Security promised to loan Bogard money when—according to Bogard's testimony—Chestnut said, "Well, I'll take this to the loan committee and within two or three days, we ought to have something here, ready for you to go with." Record, pp. 124-25. The first portion of this statement, however—that he would take the application to the loan committee—was an expression of intention. Moreover, Chestnut's statement that they ought to have something in two or three days ready for him to go with was a prediction. As we previously stated, neither a prediction nor a statement of intention is a promise.[3]

Thus, we conclude no contract existed between Security and Bogard because there was no mutuality of obligation, and Bogard was not entitled to recover under the doctrine of promissory estoppel because no promise was made by Security. Hence, the trial court's judgment for Bogard on his counterclaim must be reversed.

YOUNG, P.J., concurs in majority opinion.

CONOVER, J., dissents with opinion.

CONOVER, Judge, dissenting.

I respectfully dissent. There was substantial evidence supporting the trial court's finding of promissory estoppel in my opinion.

Bogard had been doing business with Security for 34 years. Throughout this relationship, Security apparently had cloaked its Oaktown branch managers with the authority to approve whatever loans the managers and Bogard agreed upon. The lending committee's so-called final approval was a mere "rubber stamp" formality under the apparent authority the bank bestowed upon the two branch managers with whom Bogard had dealt during that period.

Over the years, Bogard had relied upon the branch managers' claims they had the authority to make the loans he had received from time to time. Bogard never had been turned down and was, according to Security's assertions, a good customer. Based upon past practice, Bogard reasonably believed he would receive the loan he needed to prepare for his upcoming year's farming transactions because the branch manager had approved it. Nothing in the evidence can reasonably be said to put him on notice the approval procedure for this loan would be different from the bank's past practice.

Farming provided Bogard with his livelihood, Bogard's reliance was of a substantial character. Given the long standing nature of the relationship and the detriment which arose from the bank's refusal to make the loan, it is clear to me injustice

2. The findings of fact erroneously identify 1982 as the year of the dispute between Bogard and Security. The record reveals and the parties agree that 1983 is the proper year, and we will assume the trial court intended to refer to 1983 and not 1982 in its findings.

3. Bogard also cites *Tipton County Farm Bureau, supra*, in support of his argument that the fact he had been involved with Security for thirty-four years and with Chestnut for eleven or twelve years establishes that Security promised to lend him money. In *Tipton County*, however, an oral promise was made. The length of time that the parties had conducted business was probative of another element—whether the promissor should reasonably expect his promise to induce action or forebearance of a definite and substantial character—and not the determination of whether there was a promise or not.

can be avoided only by enforcing the agreement. See, *Citizens State Bank v. Peoples Bank* (1985), Ind.App., 475 N.E.2d 324, 327; *Larabee v. Booth* (1984), Ind.App., 463 N.E.2d 487, 490; *see also* Restatement (Second) of Contracts § 90 (West 1981).

A general judgment will be affirmed if it can be sustained on any legal theory by evidence introduced at trial. *Erie-Haven v. Tippmann Refrigeration Construction* (1985), Ind.App., 486 N.E.2d 646, 648. Accordingly, I would affirm the trial court's finding on the basis of promissory estoppel and remand for further proceedings to determine appropriate damages.

The BANK OF NEW YORK and Dreyfus Liquid Assets, Inc., Defendants-Appellants,

v.

Mildred BRIGHT, Plaintiff-Appellee.

No. 2-985A290.

Court of Appeals of Indiana, Second District.

June 30, 1986.

Client brought action against investment company and bank as result of improper liquidation of her account. The Hamilton Circuit Court, Judith S. Proffitt, J., entered judgment on jury verdict in favor of client for $30,000 and bank and investment company appealed. The Court of Appeals, Ratliff, J., held that: (1) trial court did not abuse discretion in permitting client to pursue breach of contract theory, and (2) evidence supported award of compensatory and punitive damages.

Affirmed.

Sullivan, J., concurred in result.

1. Appeal and Error ⇐236(1)

Bank and investment company could not claim they were prejudiced in their defense against client's breach of contract theory, and trial court did not abuse discretion in permitting client to pursue said theory, which client informed bank and investment company that she would assert three days prior to trial, where bank and investment company failed to request continuance when evidence supporting theory was adduced at trial. Trial Procedure Rule 15(B).

2. Pleading ⇐307

Trial court could properly permit client to litigate her breach of contract claim against investment company and bank, notwithstanding her failure to comply with trial rule requiring party asserting claim based on written contract to attach document to pleading; trial court was not required to order compliance with trial rule. Trial Procedure Rule 9.2(A).

3. Compromise and Settlement ⇐5(2)

Actions of bank and investment company in fully recrediting client's account prior to trial on claim resulting from improper liquidation of account constituted only unilateral offer to settle controversy and did not preclude client from recovering compensatory damages, where client never accepted the offer to settle.

4. Banks and Banking ⇐100, 315(1)

Client asserting claim against investment company and bank as result of improper liquidation of her account was required to establish, by clear and convincing evidence, that conduct exhibited elements of fraud, malice, gross negligence, or oppression, to recover punitive damages, regardless of whether she ultimately succeeded on theory of either breach of contract or tortious conversion.

5. Banks and Banking ⇐100, 315(1)

Evidence of conduct of bank and investment company once it had been informed of its error in liquidating client's account was sufficient to support finding that bank and investment company had engaged in tortious conduct of type warranting punitive damages, where bank and investment company failed to adequately respond to several inquiries of client's husband and attorney concerning disputed transaction.

6. Appeal and Error ⇐756

Applicability of provision in client's account application absolving bank and investment company of liability for acting on instructions believed to be genuine to client's action arising out of their improper liquidation of her account would not be addressed, absent citation to authority in support of argument. Rules App.Proc., Rule 8.3(A)(7).

7. Appeal and Error ⇐1078(4), 1079

Contention that trial court erred when it gave client's instructions on tortious conversion and accord and satisfaction, in action against investment company and bank arising from improper liquidation of client's account, was waived by failure of bank and investment company to set out in their briefs verbatim objections to instructions and to make more than barest argument in support of position. Rules App.Proc., Rule 8.3(A)(7); Trial Procedure Rule 51(C).

8. Damages ⇐214

Instruction on mitigation of damages was not required in action by client against bank and investment company for improper liquidation of account absent evidence indicating that client could have reasonably taken additional steps to mitigate damages.

M. Kent Newton, Kelly R. Norris, Tabbert & Capehart, Indianapolis, for defendants-appellants.

C. Wendell Martin, Robert L. Hartley, Jr., Martin, Wade, Hartley, Hollingsworth, Indianapolis, for plaintiff-appellee.

RATLIFF, Judge, writing by designation.

STATEMENT OF THE CASE

Appellants, The Bank of New York and Dreyfus Liquid Assets, Inc., appeal from a judgment entered by the Hamilton Circuit Court on a jury verdict in favor of Mildred Bright for $30,000. We affirm.

FACTS

Mildred Bright opened an investment account with Dreyfus Liquid Assets in December, 1981. The Bank of New York, as transfer agent for Dreyfus Liquid Assets, had custody of and administered this account. By October, 1982, Mildred's account had a balance of $6,165.84.

Sometime near the end of September, 1982, the bank received instructions from a Mildred Bright of Solana Beach, California, to liquidate the account she held in the Dreyfus Mutual Fund. The signature on this order was guaranteed by the brokerage firm of Dean Witter Reynolds. The bank, however, liquidated the Dreyfus Liquid Assets account belonging to Mildred Bright of Indianapolis, Indiana. On October 4, 1982, the bank issued a check to Mildred Bright of Indianapolis, Indiana, for $6,185.84, but mailed it to Mildred Bright of Solana Beach, California, who promptly cashed it.

On February 7, 1983, Mildred Bright of Indianapolis, Indiana, received her quarterly dividend advice statement from Dreyfus Liquid Assets showing that her account had a zero balance. The following day Mildred's husband, Joe, called the toll free number printed on the advice to inquire about the status of her account. He was told that the bank had a research department to handle these problems and to call again in 24 to 48 hours. When Joe called on February 10, 1983, he was told the matter was being researched. At that time, he requested a copy of the liquidation transaction and was told one would be sent. Five days later Joe made his third call to the bank's toll free number and was informed that the matter was still being researched.

Tab E

IN THE FIFTH JUDICIAL DISTRICT COURT FOR IRON COUNTY

STATE OF UTAH

STATE BANK OF SOUTHERN UTAH, a Utah banking corporation, Plaintiff, vs. TROY HYGRO SYSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL; LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL and JOHN DOES 1 through 10, Defendants.	Case No. 900901153
TROY HYGRO STSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL; LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL, Counterclaimants, vs. STATE BANK OF SOUTHERN UTAH, a Utah banking corporation, Counterclaim Defendants.	

DEPOSITION UPON ORAL EXAMINATION OF:

JAMES MARKELL

TAKEN AT: 505 East 200 South, #400, Salt Lake City, Utah

DATE: December 10, 1991

REPORTED BY: Wendy Randall, CSR, RPR

File No. 11561

A Yes, at that point, yes.

Q Now, at some point you went into the State Bank?

A Yes.

Q Do you recall when that was?

A I would guess it would be mid to late January with basically the same package that we had at Zions.

Q I would like to have, if you would, basically, meeting by meeting and discussion by discussion, take me through your dealings with State Bank. I realize you are not going to be able to give me every date, but to the extent that we can, I would like to keep the significant discussions and meetings separate so that we can sort of piece this together. Tell me what your first meeting was with State Bank or any of its representatives?

A My first meeting was with Lee.

Q Do you recall when that was?

A Here again, mid to late January.

Q That was in his office?

A In his office at State Bank, right.

Q Do you recall who else was present, if anyone?

A I think he may have -- I don't know if

anyone was present for our talks, but I think he introduced me -- here again, we had been there with our checking account, but I don't think I had even met Lee before that. He may have introduced me to Elwyn and some of the other guys, but basically that's it.

Q Did you bring any papers with you to that first meeting?

A I don't remember. I don't recall if I had the SBA papers with me or if I had just come in to initially meet Lee and talk to him conceptually about this.

Q Do you remember what was said and by whom in that first meeting?

A I basically laid out the plan as we had proposed it to Zions Bank. Lee reacted to that plan or to that explanation of and conception of what we were doing in at least a little bit above a neutral fashion. Sounds good, bring the papers in. He probably didn't even say it sounded good, but we will take a look at it.

Q Do you recall him saying anything else in response to your inquiry?

A No.

Q Tell me a little bit about the plan that you submitted to him. Did it include continuing to

lease the four greenhouses from the Christensens that were already in place or did it contemplate at that time that you would purchase the four greenhouses that were already in place?

A Initially, we had planned to continue leasing those greenhouses from Boyd and building, and I think we, even at that time, had gone from six to five. I don't recall specifically, but let's say that we went from six to five on one of the 20 acre parcels or on the 40 across the road. That was the initial plan and that we were trying to see if we could get enough money by using the two 20 acre parcels as collateral to basically buy the greenhouses and put those units up.

Q On the 20 acres?

A Right, or 40 or whatever.

Q Did Mr. Fife ask you to come back or did he ask you to get information and then come back or what did he tell you to do after that?

A I don't know that he told me to do anything. We agreed that I would come back probably later that week or the next week with the information, some more specific information about what we proposed to do.

Q What did you do after that first meeting?

A I would probably have been on the phone to Mike that evening and basically reported to him about the meeting with Lee and made sure that I had all of the information, the pro formas that had been provided for Zions and whatever information, if indeed he had asked me for more information. I don't know that he would have at that point because he hadn't seen anything, but basically get all of the data together that we had accumulated and go see Lee again.

Q Did you do that?

A Yes.

Q Do you recall what data you put together?

A We had some of the SBA forms that had been filled out. I don't recall which ones had been filled out, but probably the simpler ones that would require like appraisals and things like that.

Certainly pro formas on what we projected could be done based on what we already had done in New Castle. Probably geothermal data, heat, what it cost us to heat these things so you could show where the potential for covering the debt would be and then, of course, the cost of the greenhouses. Since we were manufacturing the greenhouses themselves, that would have been part of it.

Q You would have already had that information

internally?

A We would have already had that. All of the ratios and things like that, Mike and Lee did over the phone, I'm sure. I'm sure I am not that financially oriented to be able to do that kind of thing, but basically the simpler things that I could provide would have been probably in a package at that second meeting.

Q When did that second meeting take place?

A I would guess some time either late January or first part of February of '85.

Q Do you recall who was present at that meeting?

A That would have just been Lee and I.

Q Tell me what was said and by whom at that meeting?

A Lee, at that point, would probably have said he would take a look at it.

Q Do you recall anything else specific being discussed?

A No.

Q When you say probably would have said that, that tells me that you don't remember exactly, but you are assuming from all of the other facts that you know that that's what took place?

A Right. Lee didn't write me a check at that point. Let's put it that way.

MR. HIGBEE: Off the record for just one second.

(Brief recess)

Q (By Mr. Higbee) Mr. Markell, I believe when we went off the record, we were basically up to the second meeting with Mr. Fife, chronologically, and we were just kind of going through your meetings and dealings with the bank from start to finish. Do you recall anything else of that second meeting of any significance?

A No.

Q What happened next?

A The next thing I recall and I know that there had to be subsequent meetings between Lee and myself, but the next thing that I can remember -- because we meet a lot. I don't know, but a couple two or three times a week sometimes. If I happened to be in there, I would stop and we would talk about where we were as far as what information we needed to be gathering, as far as putting an SBA thing together and here again, still on the first initial $170,000 thing.

The next one that I recall was when Boyd Christensen shocked me basically by being a little bit

insistent that we consider purchasing. That was in March. Now, we go from January or the latter part of January, first part of February, to the latter part of March.

Q So two months span?

A Yeah. Here again, the individual meetings with Lee between the end of January or the first part of March and that one meeting when I came back to him with the information I got from Boyd, I don't know what transpired there.

Q Would it be safe to say that just what I will call the routine fact gathering and discussions?

A Right. I would characterize it that way, right.

Q Anything of significance you recall being said?

MR. CALL: During what time?

Q (By Mr. Higbee) During this two month time period, between the end of January and the end of March?

A Nothing significant other than we had not been discouraged from continuing this process of gathering information to try to put this loan together.

Q But at that point, no commitments had been

made?

A No.

Q Now, you have referenced this conversation with Boyd Christensen. Where did that conversation take place?

A This one took place in his corral out at his farm in New Castle towards the end of March of '85. It might have even been the first part of April.

Q Who was present?

A Boyd and myself.

Q Tell me what Mr. Christensen said and what you said in return?

A Specifically, I was down there because we had been having some problems to having to heat the greenhouses. That was this pump situation, I think. There was some problem of getting him to pay part of our costs for leasing the operation. Apparently there was some things that had gone wrong that he assumed liability for and we were trying to get him to pay for it.

Q This is the well pump that you are talking about?

A Yeah. I think this is the well pump point. He was pretty adamant about -- at this point, I think

the money between you and Michael in that second conversation?

A Probably nothing other than the fact that he had always said that he needed money. He needed money. Boyd always needed money. He would comment that if he had a million dollars, he would just blow it farming.

Q Just keep farming until it was gone?

A Yeah, that's right.

Q So in that sense, it wasn't a real surprise that Boyd needed the money then?

A No. Here again, unless you got into his personal stuff, and you wouldn't want to do that.

Q What happened next? By now I take it we are somewhere around the first part of April, within the first few days of April?

A Right.

Q Tell me what happened next in relation to this entire transaction?

A The next thing that's in my mind was going to see Lee, here again, still talking about maybe collateralizing this and building the greenhouse on the 20 and telling him -- I remember meeting in April. It wasn't April Fool's Day. It was income tax. It was the 15th of April, 1985 because it was IRS day and

I was going to be late. I told Lee that Boyd had mentioned buying the place and I remember specifically laying that out, not trying to draw Lee in or anything, because it was something totally out of this world to me how -- well, there was just no way we could do that. When I told him Boyd wanted 150,000 for that, and that was totally out of the picture, I was shocked that Lee even flicked the bait out at all.

Q What was his response?

A His response was, well, let's not jump to conclusions. Let's take a look at it. That was exactly what he said. We will take a look at it, because I was just floored.

Q That was sort of Lee's pat answer is we will take a look at it?

A Yeah, exactly. But obviously, to me it was a no sale. To me it was an absolute impossibility and for Lee to even say, well, let's take a look at it was cause for doing back flips because Lee was our guy.

Q You said several times that for you, you thought it would be impossible or difficult and I can't remember the exact words you used. But was that because you were concerned that you would not be able to put up enough collateral to take care of the bank's desires to be secured?

A I would have to say that I felt it was way out in left field and probably because of my lack of financial wherewithal. I didn't know the options. I didn't know -- to me it was just like why anybody would want to spend $30,000 on a car. It has a lot to do with my background and the way I was brought up and things and it was totally off base.

Q Did you have any concerns about the company's ability to meet the debt service if you had to borrow the $150,000 or do you recall that occurring to you?

A Well, all the pro formas were based on nine greenhouses at that point. The pro formas indicated that there would be absolutely no problem, even if we did half of what we had projected. I forget what the break was, but it was something like ten pounds a plant or twelve pounds a plant or whatever. So I felt pretty good about that, but it was just a matter that there's no way anybody would loan -- let's face it, Zions Bank turned us down.

Q Mike and I talked a little about that in his deposition. Fifteen hundred dollars is a healthy amount and there's not an awful lot of difference between that and the debt service amount?

A Right.

Q Anything else you remember being discussed in that conversation?

A We would have periodic conversations like that. From that point, his attitude changed and when he found out that we were actively trying, putting forth an effort to basically getting what he wanted, to buy his land, his attitude changed considerably and I think he did everything he could to help us and himself at the same time to see that happen.

Q What did you do next to move this project forward?

A I would guess that at this point -- no, I don't guess, but I would say specifically that probably in May, it had gotten to the point where it had gotten serious that Mike and Lee had talked ratios and all of these specific terminologies that I'm not real connected with, but that it was serious and it was time to get appraisals and put into practicality what at that point was theory, that maybe these things would be worth X amount of dollars.

What's the geothermal resource worth based on all of these appraisals, so at that point, it would have been in earnest. I think it was May or June even when the appraisal was done, the first one.

Q Did you have meetings with Mr. Fife during

this time?

A I met with Lee Fife, at that point at least, conservatively twice a week.

Q Is there any one particular meeting during that period of time, and I'm going from late April of '85 through, I believe, you threw out the term June of '85, so basically the last part of April, May and June, any one meeting that stands out in your mind of any discussions with Mr. Fife?

A No, not at all. It was always up beat and positive. Take it step by step. Lee would basically tell me what information he needed, where we are at. We have got to get the appraisals, so I would make arrangements for that to happen. At whatever stage we were, it was up to me to do the leg work, whether it be getting updated financial statements from East Troy and basically push their button back there to get them to supply information or get it ourselves so that we could get this package put together.

Q During this period of time, did you guys have a time table that you were shooting for to get things in place and completed?

A We had a loose time table that had been pro formaed out, I think, optimistically on one end, I think, it was the end of July of '85 that that would

have been the best of all possible worlds to start construction through, I think, the end of September or maybe even the middle of September. It's on the pro formas, whatever the pro formas were. Obviously that's what everything was based on was the pro formas too, so the timing was there.

Q Do you recall discussing the timing with Mr. Fife in any of these conversations from the first meeting in January up through the end of June that we are to now, chronologically?

A At that point, we hadn't even approached our optimum time table. There wasn't any discussion about the timing at this point. Believe me, we were real busy doing the other things.

Q And production and stuff?

A Oh, yes, exactly.

Q What are the kinds of things -- I realize that you can't remember every discussion that you had in that two month period, but what are the kinds of things that you discussed? Focus in as narrowly as you can and without pinning it down to a certain day, tell me what you and Lee talked about during those two months?

A I would say probably 75 percent of our conversation had to do with problems that we were

having getting information. The Christensens -- we would have an appraisal done and pay for it and everything would be hunky-dory and have the legal description done and they would say, oh, there's a pipeline on the back of this property. So we would have to redo. That's one example. The electric company had to have a right of way right down the middle. So we had to hassle with that. And of course, all the T's had to be crossed and I's dotted for the SBA, so there were many instances like that. Set backs and the easements and it was just a big hassle.

Q Just sort of nobody's fault type of things?

A That would be 75 percent of the conversations. It always started, how's it going, pretty good. How's everything with you and then the last part of it would be well, what do you think, how do you think things look and Lee would always, I think, probably be very careful not to mislead us that this is a done deal because at that point, it wasn't.

Q This is through June?

A Right.

Q What kind of things would he say to let you know it was not a done deal?

A Well, the board hasn't approved it yet or

I have tried to do. Is there anything else that happened in this period of time that you think is of significance that is in addition to the things that you have told us about already?

A Through what?

MR. CALL: Are you asking May and June?

Q (By Mr. Higbee) I'm asking you through June of 1985.

A No, I think that about covers it. We just had our noses to the grindstone at that point in time.

Q I don't know why we ended up with June. That's just where things stopped and now we will pick up and go. But tell me after June what happened as this matter progressed?

A From probably the mid part of June right on through to the closing, the pressures began as far as our time table of construction scenario with relationship to how much of this work had been done and the delays that had not only preceded us, but that I foresaw coming up. At that point, I wouldn't say that I started to get worried about it, but at that point, I would mention it periodically to Lee.

Q This was towards the end of June of 19 --

A First part of July.

Q You mentioned the pressures that brought

time?

A I would say things like well, I hope we can get this put together pretty soon because I have got to get started or at least start to make plans. At this point, we didn't even have a verbal, that I recall, but I knew that the bank itself I don't think had to have SBA formal approval to at least run it by their board of directors. I think they were one of those banks that could do it independently, I think.

Q Did you discuss that with Mr. Fife?

A I mentioned it a couple of times, yes.

Q What was his response?

A We would have to go through the regular channels. I really don't, at this point, recall what they would be. Whether it would be the board at the bank would approve it first or whether it goes to Salt Lake or whatever. But he was up there a lot. He had been talking with the guys up there about what some of the possibilities were down here and it led me to believe that at that point things looked pretty good.

Q Some more of this cautious optimism stuff?

A At that point in time, it was probably more than cautious.

Q Tell me what Mr. Fife said to make you believe it was more than cautious?

A Things like it looks pretty good was one of the more common ones. He stopped the we will run it by them syndrome. That was not there any more. He had got down to specifics, if this and this and this. For instance, if the ratios, the loan ratios are this and we have that it is collateralized to this degree, then that will fly with the financial folks at the SBA or the bank, things like that. It was less negative. Let's put it that way. At least it was more positive. It wasn't -- here again, we didn't have a check yet, so I can't say that Lee was overly optimistic, but it was definitely get your heart racing.

Q Over what period of time were these comments that you just described to me?

A This would be from the first part of July until we did get a verbal, which I think was August or something.

Q Verbal commitment from the SBA?

A Right.

Q So Lee would make these types of comments up until the verbal approval?

A Right.

Q When the verbal approval came in, whatever time that was, do you recall discussing that with Mr. Fife?

A Sure. As far as I was led to believe, a verbal was the next step to getting the money. That was my understanding. We knew we had to go through the steps of the formal application, but that was a breeze because basically all of the work we had already done was satisfactory and up to snuff and all we had to do was put it down on paper and slide it through and we are in. It was going to be a breeze. It had better have been a breeze at that point, because we were definitely now into the period where it was going to be nip and tuck if we could get it finished and in production on schedule.

Q When Mr. Fife told you that the SBA had given verbal approval, was that in a face to face meeting or on the telephone?

A Face to face meeting in his office.

Q At or shortly about the date that that approval was given?

MR. CALL: What approval are you talking about?

Q (By Mr. Higbee) The SBA verbal approval?

A It was that day. I think he had told me that he had talked to them in the morning. He had been up there and presented I don't know what documents, but had talked to -- what was his name,

Stan DeConno or something.

Q What did he say to you at that time?

A He was happy that they had approved -- it was verbally approved and they had approved it. We got the verbal approval, was basically what he said.

Q Did he tell you what that meant? What were the words he used?

A We got the verbal approval and it looks great. It looks good. We will do the formal application now. I would probably have asked him well, of what significance is verbal approval and that's that everything looks good on paper. Everything we have done so far and everything has been done and now we just have to go through the process of submitting it. It was a big day to us because all of that work had been done and we were at this point feeling pretty good about things.

Q During this period of time from the end of June which is sort of where we left off in the last time frame to the time the verbal approval was given by the SBA, were there any discussions between you and Mr. Fife about the time frames, about your scheduling needs and your concerns of the upcoming pressures, as you have characterized it?

A It had increased from the first of July

until whenever this verbal approval was and I wish I had the date. The first of September or in August. It had consistently escalated. I would relate to Lee that well, I sure hope things go the way we had planned because it was going to be tight. Then -- here again, I don't want to jump ahead, but it had gradually escalated to the point that he knew I was very concerned about it. I don't know if Mike mentioned it, but I had mentioned to Mike that I was worried about it.

Q What did Lee respond when you told him those things?

A He's doing the best he can.

Q What other words do you recall Mr. Fife using between you and he as you discussed this problem of the time pressures?

A I don't want to say that he dismissed it because I know he was concerned. He was on our side. He was concerned about things, but it was always like it doesn't exist, like we would deal with it. As far as specifically what he said, probably saying nothing said it all.

Q Did he give you any commitment during that period of time as to when it would be available or when it would be completed or when it would be funded?

A Soon. That would be Lee's commitment.

Q Do you recall him using that word?

A Yes, soon.

Q Anything else on that topic that you recall being discussed between you and Mr. Fife during that time period?

A No. That would be it through when we got the verbal.

Q Tell me what you did after you got the verbal from that meeting in Mr. Fife's office?

A Spent a week of not seeing Lee and waiting for the official notification.

Q Who was finishing up the paperwork at that time?

A That would have been between Lee and I, but I think he had most of it. Mike and he would talk periodically on the phone about getting this form or that form from East Troy. At this point, the corporate thing came into it. We had pretty much finished with my day to day or week to week, or whatever. So about a week following that verbal, things were pretty good.

Q Were you involved in the numbers; that is, how much they were going to borrow, how it was going to be paid back, what the interest rates were and

A Right.

Q What happened next? What's the next event of significance that you remember?

A The next time I saw Lee, I went in and asked him how long it was going to be before we got the money. That was the big question.

Q What was his answer?

A Number one, how was he coming and had he gotten the paperwork submitted, the application formalized and submitted, which, I think he had, at that point. It was a relatively fast procedure.

Q When did that conversation take place?

A That would have been about a week after that, so here again, based on that verbal, September 1st.

Q Roughly?

A Yes.

Q What was Mr. Fife's response to your inquiries?

A Soon. It would be soon. The process -- as soon as the SBA got the package and I think he may have even been going to take it up there which was a common thing. He was going to Salt Lake a lot. So here again, I can't say he told me to relax and don't worry about it, but he said soon. So this would be

another week shot in my mind. At this point, I was starting to get the idea that a week here and a week there and that's the type of thing I would tell him, a day here or a week here or as days stretch into weeks, those are the kind of things I'm worried about as far as getting started here because depending on the weather, I have seen Decembers in New Castle as witnessed there this year, that it can be pretty bad, to the point where you couldn't do anything. That was what I was just petrified of.

Q Did you express to him those concerns?

A Yes.

Q What was his response?

A What could he say? He didn't really respond to it. He listened to me intently and well, we will do the best we can type of thing. He never said anything like, oh, don't worry about it or anything like that, but he basically --

Q Really, that's all he could have said?

A Yeah. I was probably whining at the wrong guy at that point.

Q Then what was the next thing of significance that happened, as best you recall?

A After, I think, probably -- or I know very soon afterwards and I would guess this to be around

the 15th of September or maybe even the 1st. Somewhere between the 1st and the 15th we got the written approval from the SBA. We are in. As far as I was concerned, that was as good as a check. I mean they said, okay, so let's go. I went in to see Lee, here again, to press him and to find out when we were going to do this, when we were going to be able to get going.

Q When you say you went in to see Lee, did you know the SBA had given written approval?

A Yes. He had called me and had gotten it in the mail. He was up there and got it or up there and knew that they sent it. So there was a three day period in there, again, another three days where we knew it was coming, but he had to get it type of thing. So he did get it.

Q So then you went into his office?

A Yes.

Q Who was present in that conversation?

A Just Lee and I.

Q What was said and by whom?

A I was asking him what the process was in getting the money to get started, how to proceed here to make plans in getting some people on the site and he answered to the question when I asked him when we

were going to get the money, it was, he didn't know at which point I really started to press him, probably a little bit too vigorously these delays would cause --

Q What did you say?

A I would just go back over the point that if we get delayed here too much longer, it's going to be a matter of getting into the winter time and that's going to cost us more money to build. It's going to delay us into the spring. I made him aware and he was aware. Here again, I was covering the same ground every time, of what this was going to do. At that point, he basically just reached over and grabbed the whole SBA package, sat it in front of me and said, "Go see if you can peddle it to another bank."

Q Did he explain to you what that meant?

A No. Here again, to me it was a check that was made out that nobody had endorsed. That's the way I looked at it. I didn't know why. I had no idea why he did that. No clue at that point. I was glad. Gosh, here I might be able to do it and get the money soon to get started. I thought maybe if some other bank took it, took the loan for State Bank, that they would still have it in some way. I had no idea why this was happening other than the fact when I did go to the other bank, they all looked at me pretty

anybody else that we shouldn't believe that certain events were going to happen in a certain timely fashion and they hadn't. So for lack of a better term, be gun shy at that point.

Q You said you were led to believe that certain things would happen. I would like to know specifically what things you were led to believe would happen and what led you to believe they would happen. Take them one at a time.

A The simple fact that no one led us to believe that they wouldn't happen.

Q Let's put the horse ahead of the cart. What things were going to happen?

A That right from the beginning that the SBA approval would be coming, that the funds would be made available soon. That's it. That's the quote. That it looked great with regard to the approval of the package. I mean that's certainly --

Q So those are the two things. The SBA approval and the funding of the loan were the two things that you were led to believe that would happen?

A Oh, yes.

Q Anything else that you were led to believe that would happen?

A No.

Q The things that led you to believe that were, and I'm saying this as broadly as I can, from what you said in your favor, that the bank knew about your scheduling requirements because of the pro formas that you had given to them and also because of the statements that you began to make to Mr. Fife starting in the first of July?

A Yes.

Q Mr. Fife had said soon, it looked good, coupled with the periodic reports on the specifics; that is, the appraisal is in, this is in and that's in and those sorts of things. Anything else that you can think of that led you to believe, in your words, that the SBA approval would be given and the funding of the loan would be completed?

A No.

Q Other than the pro forma statement showing the dates and your statements to Mr. Fife about the dates, there was never a commitment from the bank as to when the funding would be available?

A Well, the way we looked at it and maybe it's relevant and maybe it isn't --

Q The way you looked at it is relevant.

A That if you propose to do that pro forma, in a narrative situation, is that if you apply for a

Tab F

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR IRON COUNTY

STATE OF UTAH

STATE BANK OF SOUTHERN UTAH, a Utah banking corporation, Plaintiff, vs. TROY HYGRO SYSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL; LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL and JOHN DOES 1 through 10, Defendants.	Case No. 900901153
TROY HYGRO SYSTEMS, INC.; MICHAEL R. KEHL; GLORIA F. KEHL; LENORE F. KEHL; KEITH KEHL; KAREN SUE KEHL, Counterclaimants, vs. STATE BANK OF SOUTHERN UTAH, a Utah banking corporation, Counterclaim Defendant.	

DEPOSITION UPON ORAL EXAMINATION OF

MICHAEL R. KEHL

VOLUME II

TAKEN AT: 505 East 200 South, #400, Salt Lake City, Utah

DATE: October 25, 1991

REPORTED BY: DEANNA H. ATKINSON, CSR, RPR

CAPITOL REPORTERS
175 South Main, #510
Salt Lake City, Utah 84111
(801) 363-7939

File No. 11416

(Examination by Mr. Higbee)

as soon as we get that, that the bank can process the stuff, that we can get at least a preliminary construction loan and we can start construction. And now we were at a point where, given our construction, you know, schedule, you know, we're starting to push it.

Q. Okay. You said you were given the impression that that could take place, that the construction funds could be advanced immediately. Did the bank ever say or do anything directly with you, not through Markell, but directly with you, to give you the impression that the funds could be advanced right away?

A. I don't recall a specific conversation where Lee told me personally, or anybody at the bank said personally that -- I was the paperwork signer, I was the conceptual developer, and I was party to the conceptual approvals or agreements, and inherent in those agreements and in those discussions was this construction scenario, which to our mind was nothing -- this is rather standard, I mean, just common sense will tell you that that schedule has to be reasonably adhered to. Again, there was leeway built into it, and it could slip some, but we just -- all along after we got the verbal, that's what we were both, Jim and

(Examination by Mr. Higbee)

I, were concerned about, is if we're going to be building these things by August at the latest and that's what -- I guess it's not so much what the bank or Lee specifically said to me; it's what he didn't say that gave me the impression that, at the latest, we would be doing it by the end of August.

Q. So he didn't say it; you assumed it?

A. I assumed it, based on the fact that if I was mistaken, he would have ample opportunity to correct my mistaken assumption.

Q. Okay. We come up to the time of the closing, then, in October. At that point, you knew exactly where you were. Did you tell him, "No, it's too late, we can't do it any more"?

A. No.

Q. What did you do?

A. I went ahead and did it anyway. And in hindsight, it's not the best decision that I ever made. By that point we had too much money in it. We had a guy out there committed to doing the construction that was hired specifically for that task.

Q. Who's that?

A. Mike Laflin. The whole concept, the whole Utah development scenario, you know, all of that work,

could only slip so much.

Q. Did the bank ever say, in effect or anything similar to this, "Okay, we agree that we will fund the loan in time to meet with your schedule"?

A. I don't remember an exact conversation. Maybe they had one with Jim, or maybe said something to that effect to him, but not directly to me.

Q. By what date was the bank committed to loan the money? You're saying by the 31st of August?

A. That was the date that everybody -- or end of August, something to that effect, was the date that everybody was agreeing to, either by stating it, at least in our case, on a regular basis, or by the fact that they never -- the bank never said anything otherwise. In other words, even if they didn't say it would be this particular date, they were well aware of the schedule; they had ample opportunity to say, "That's just not realistic. We don't think we can do it by then" or, "No, you guys are unrealistic. This thing isn't going to get done until October." They had every opportunity to, if our assumption and what we were telling them was naive or a bad assumption, they had every opportunity to set us straight, and they never did.

Q. So you're saying, then, if I understand what

(Examination by Mr. Higbee)

A. Uh-huh.

Q. -- "and committed to loan Troy the amount of $325,000 upon approval by the SBA." When was that commitment that you allege made?

MR. CALL: Now, you're asking him that personally or as Troy Hygro? Because we're going to have problems here, because some of the information comes from other officers of Troy.

Q. Based on the best knowledge that you have available to you at the present time, as you sit here, when was the commitment that you referred in Paragraph 7 made?

A. The commitment was made, to my knowledge, as an inherent or integral part of the loan application package and the narrative that went along with it, where we laid out construction schedule, and then in regular discussions with them, that -- you know, that that schedule wasn't -- that particular one wasn't cast in concrete and that it could slip; but in any case, that we certainly should be starting construction by the end of August. And it was either implied or -- everybody knew, including the bank, or at least Lee, that there was this schedule, and that we were -- and especially in the form of Jim Markell, and especially as things dragged on, that the schedule

(Examination by Mr. Higbee)

could only slip so much.

Q. Did the bank ever say, in effect or anything similar to this, "Okay, we agree that we will fund the loan in time to meet with your schedule"?

A. I don't remember an exact conversation. Maybe they had one with Jim, or maybe said something to that effect to him, but not directly to me.

Q. By what date was the bank committed to loan the money? You're saying by the 31st of August?

A. That was the date that everybody -- or end of August, something to that effect, was the date that everybody was agreeing to, either by stating it, at least in our case, on a regular basis, or by the fact that they never -- the bank never said anything otherwise. In other words, even if they didn't say it would be this particular date, they were well aware of the schedule; they had ample opportunity to say, "That's just not realistic. We don't think we can do it by then" or, "No, you guys are unrealistic. This thing isn't going to get done until October." They had every opportunity to, if our assumption and what we were telling them was naive or a bad assumption, they had every opportunity to set us straight, and they never did.

Q. So you're saying, then, if I understand what

you said correctly, that you're not aware of the bank ever saying that they would meet your schedule, but they did not say that they wouldn't, based on all the facts that were available to them?

A. Yes, as far as with me personally.

Q. Okay. Now, it's important, the date that the bank committed to loan the money, and you say that's the end of August sometime?

A. Well, it depends on what -- I don't really know what would be, from a legal standpoint, defined as when they committed to it. The board approved it -- you know, first you get an approval from Lee. He says, "Well, it looks good to me; everything seems to be in order; and I'll" -- in the meantime, he's running things by the SBA, and it finally gets to the point where he runs it by the board.

And the board gave its approval -- I don't really remember when that was. It was before -- it really had to be before the application was made to the SBA. I believe the board approved it, of course, subject to the loan guarantee by the SBA.

Q. Which was given sometime around the end of August, as I remember?

A. Yes, I believe -- well, yeah, the application -- finally, Lee said, finally, "We gotta

Tab G

HEGLAR RANCH, INC., an Idaho Corporation, Plaintiff and Respondent,

v.

Leonard M. STILLMAN and Juanita P. Stillman, husband and wife, Defendants and Appellants.

No. 16830.

Supreme Court of Utah.

Nov. 12, 1980.

Purchasers appealed summary judgment of the Third District Court, Salt Lake County, Homer F. Wilkinson, J., on promissory note, contending that factual issue was raised by their defense of duress which made summary judgment inappropriate. The Supreme Court, Hall, J., held that purchasers failed to prove duress.

Affirmed.

1. Judgment ⇐181(2, 3)

Summary judgment is appropriate if pleadings and all other submissions, including depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue as to any material fact and that moving party is entitled to judgment as matter of law. Rules of Civil Procedure, Rule 56(c).

2. Judgment ⇐181(2)

Rule that summary judgment is appropriate if pleadings and all other submissions show that there is no genuine issue as to material fact and that moving party is entitled to judgment as matter of law does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted. Rules of Civil Procedure, Rule 56(c).

3. Contracts ⇐95(1)

To invalidate a contract, a party thereto must show that other contracting party committed harmful act which put initial party in fear such as to compel him to act against his will.

4. Bills and Notes ⇐520

Purchasers failed to prove duress as defense to action involving promissory note, execution of which was condition imposed upon purchasers before entering into a second real estate agreement after they had failed to perform first agreement, where purchasers failed in any way to demonstrate how it was wrongful for vendor to follow advice of counsel and impose conditions upon reinstatement of real estate agreement so as to insure against further financial loss in event of second failure to perform contract, and purchasers were not placed in such fear as would have deprived them of their free will since, by one purchaser's own admission, had purchasers chosen to walk away from negotiations, only consequence thereof would have been loss of whatever benefits deal might have afforded them had it been closed.

Robert R. Brown, Salt Lake City, for defendants and appellants.

George N. Larsen, James F. Shepherd, Salt Lake City, for plaintiff-respondent.

HALL, Justice:

Defendants appeal the summary judgment of the district court on a promissory note, contending that a factual issue was raised by their defense of duress which made summary judgment inappropriate.

Defendant Juanita Stillman contracted with plaintiff on May 12, 1978, to purchase certain land located in West Jordan, Utah. The purchase entailed plaintiff's acquisition of the subject land from one Rosella Woods by means of a land exchange. By the terms of the contract and escrow agreement executed by the parties, the purchase was to be closed the same day by payment over to the escrow agent of the full pur-

chase price of $704,000 in return for delivery of a warranty deed to the property.

There was a failure of performance on the part of defendant Juanita Stillman occasioned by her inability to secure the funds with which to pay the purchase price, and the escrow was therefore terminated. A short time thereafter, defendant Juanita Stillman advised plaintiff of the further prospect of financing and of her desire to reinstate the agreement. On June 21, 1978, plaintiff, through legal counsel, informed defendants of its willingness to reinstate the prior agreement, conditioned upon the execution by both defendants of two promissory notes in the amount of $25,000 each, one being the note that is the subject of this lawsuit, and the other payable to Rosella Woods. As a further condition of reinstatement, in the event defendant Juanita Stillman should again fail to perform by June 29, 1978, the agreement would again be terminated and the escrow documents, including the promissory notes, would be delivered to plaintiff as stipulated damages.

Defendants balked at the conditions imposed and sought to be relieved thereof by telephoning plaintiff's president, Mr. Max Gillette, who disclaimed any knowledge of the imposition of such conditions, but did agree to look into the matter.

Defendants' additional efforts to contact Gillette failed, and on June 23, 1978, they appeared in the office of the escrow agent with their own legal counsel, at which time they executed the supplemental escrow agreement, including the promissory notes, although they did so under protest.

Defendant Juanita Stillman again failed to pay over the purchase price, and this action on the note payable to plaintiff was instituted. Based on the pleadings, affidavits, depositions of the defendants, and other supporting documents, plaintiff's motion for summary judgment was granted by the trial court.

[1] Summary judgment is appropriate if the pleadings and all other submissions [1] show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[2]

[2] The foregoing rule does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted.[3]

[3] The rule regarding the avoidance of contractual obligations by reason of duress is as set forth in the case of *Fox v. Piercey*: [4]

> . . . any wrongful act or threat which actually puts the victim in such fear as to compel him to act against his will constitutes duress.

Thus, to invalidate a contract, a party thereto must show (1) that the other contracting party committed a wrongful act (2) which put the initial party in fear (3) such as to compel him to act against his will.

[4] Viewed in light of the above requirements, defendants' contention is wholly without merit that a material issue of fact has been raised, the resolution of which could constitute the defense of duress. Defendants have simply failed to in any way demonstrate how it was *wrongful* for plaintiff to follow the advice of counsel and thus impose conditions upon the reinstatement of the agreements, so as to insure against further financial loss in the event of a second failure to perform the contract. Moreover, defendants were not placed in such fear as would deprive them of their free will–by defendant Juanita Stillman's own admission, had they chosen to walk away from the negotiations, the only conse-

1. Including depositions, answers to interrogatories, admissions, affidavits, etc.

2. Rule 56(c), Rules of Civil Procedure.

3. *Kesler v. Kesler*, Utah, 583 P.2d 87 (1978), citing *Disabled American Veterans v. Hendrixson*, 9 Utah 2d 152, 340 P.2d 416 (1959).

4. 119 Utah 367, 227 P.2d 763 (1951).

ience thereof would have been the loss of hatever benefits the deal might have afrded them had it been closed. To label as luress" such incentive to complete the ansaction would have the effect of peritting any party to avoid a contractual bligation on the ground that performance as agreed to only because, in the absence f such a promise, the party would be deied the benefit of a bargain. Such a deense is entirely foreign to the established aw of contracts.

Affirmed. Costs to plaintiff.

CROCKETT, C. J., WILKINS and STEWART, JJ., and R. L. TUCKETT, Retired Justice.

MAUGHAN, J., does not participate herein.